TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 585.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY AND THE NORTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 5, 1895.

(15,859.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1895.

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a No. 113.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff in Error,
v.
CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants in Error.

Writ of Error to the Circuit Court of the United States for the District of Idaho.

Transcript of record.

W. W. Cotton and D. C. Lockwood, attorneys for plaintiff in error; McBride & Allen, attorneys for defendant- in error.

Endorsed: Filed Jun- 5, 1893. F. D. Monckton, clerk.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

WASHINGTON & IDAHO RAILROAD Co., Plaintiff in Error,
v.
CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants in Error.

Printed Transcript on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth judicial circuit, district of Idaho, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit cou: before — and between The Washington & Idaho Railroad Company,
2 plaintiff, and The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, defendants, a manifest error hath happened to the great damage of the said Washington & Idaho Railroad Company, as by its complaint appears, and it being fit that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are commanded, if judgment be therein given, that then, and under your seal distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 15th day of May, eighteen hundred and ninety-three, in the said U. S. circuit court of

appeals for the ninth circuit, to be there and then held; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States, the one hundred and seventeenth.

A. L. RICHARDSON, *Clerk.*

The above writ of error is hereby allowed.

JAS. H. BEATTY,
One of the Judges of the Circuit Court and Presiding at the Trial of the said Action.

3 Endorsed: In the circuit court of the United States, district of Idaho. Washington & Idaho R. R. Co., plaintiff, *v.* Cœur d'Alene R'y & Nav. Co. and N. P. R. R. Co., defendants. Writ of error. Due service of the within writ by certified copy as prescribed by law, is hereby admitted at Spokane, this 21st day of April, 1893. McBride & Allen, attorneys for defendant-. Filed April 24th, 1893. A. L. Richardson, clerk.

Complaint.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON & IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
v.
THE CŒUR D'ADENE RAILWAY & NAVIGATION COMPANY, a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants.

The plaintiff complains and alleges:

First. That, at all times hereinafter stated, the plaintiff was a corporation duly organized under the laws of Washington Territory.

Second. That, at all times hereinafter mentioned, The Cœur d'Alene Railway & Navigation Company, defendant, was a
4 corporation duly organized under the laws of Montana Territory, and that at all times hereinafter mentioned, The Northern Pacific Railroad Company, defendant, was a corporation duly organized under the laws of the United States of America.

Third. That on the 10th day of July, 1887, the plaintiff was lawfully possessed, as owner in fee-simple, of that certain tract of land situated in Shoshone county, Idaho Territory, described as follows,

to wit: Being the right of way of plaintiff's railroad, consisting of a strip of land 200 feet in width, or 100 feet on each side of the following-described centre line as the same is located: Beginning at station 3677 on plaintiff's line of railroad as definitely located, at Wallace, in said county, and running thence south 46 deg. 35 min. east, 370 feet to a point; thence on a curve to the left, having a radius of 955.4 feet, a distance of 355.8 feet to a point; thence south 67 deg. 56 min. east, 418.9 feet to a point; thence on a curve to the right, having a radius of 1,432.7 feet a distance of 473 feet to a point; thence south 49 deg. .01 min. east, 806.6 feet to a point; thence on a curve to the left, having a radius of 716.8 feet, a distance of 718.8 feet to a point; thence no-th 73 deg. 29 min. east, 956.9 feet to station 3718.

Fourth. That the plaintiff being so possessed, the defendant, The Cœur d'Alene Railway & Navigation Company, afterward, on the 1st day of August, 1887, entered into the possession of the demanded premises and ousted and ejected the plaintiff therefrom, and now unlawfully withholds the possession thereof from the plaintiff, to its damage in the sum of one thousand dollars.

5 Fifth. That the value of the rents, issues and profits of the said premises from the 1st day of August, 1887, and while the plaintiff has been excluded therefrom by the defendant, is five thousand dollars.

Sixth. That the defendant, The Northern Pacific Railroad Company, claims to be in possession of the said premises as a tenant of the Cœur d'Alene Railway & Navigation Company, and is actually in the possession of said premises at the present time.

Seventh. That the plaintiff is still the owner in fee-simple and entitled to the possession of the demanded premises and every part and parcel thereof.

Wherefore, plaintiff demands judgment against the said defendants for the possession of the demanded premises and every part and parcel thereof; for the sum of six thousand dollars as damages and for the values of the rents, issues and profits of the said premises, and for costs.

WOODS AND HEYBURN,
Attorneys for Plaintiff.

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

W. W. Woods, being duly sworn, on his oath says: That he is one of the attorneys for the plaintiff in this action; that he knows the statements in the foregoing complaint, and that the same are true of his own knowledge, except as to the statements therein on information and belief, and as to these statements he believes them to be true; that the plaintiff is a foreign corporation, organized under the laws of Washington Territory, and the plaintiff's

6 officers and the designated agent of said corporation are absent from the county of Shoshone, in Idaho Territory, where its attorneys reside.

W. W. WOODS.

Subscribed and sworn to before me, this 15th day of May, 1889.
[SEAL.] F. E. LUCAS,
Notary Public.

Endorsed: No. 23. No. 526 in the district court, Shoshone county, Idaho. The Washington & Idaho R. R. Co. *v.* The Cœur d'Alene R. & N. Co. *et al.* Complaint. Filed May 15, A. D. 1889. F. H. Grierson, clerk, by John P. Sheehy, deputy. Woods & Heyburn, attorneys for plaintiff. Filed April 7th, 1891. A. L. Richardson, clerk.

Summons.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY, a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants.

TERRITORY OF IDAHO:

To The Cœur d'Alene Railway & Navigation Company, a corporation, and The Northern Pacific Railroad Company, a corporation, defendants:

You are hereby notified that there is now on file in the
7 office of clerk of the district court, of the first judicial district of said territory, in Murray, county of Shoshone, the complaint of the above-named plaintiff, wherein judgment is demanded against you for the possession of that certain tract of land situated in Shoshone county, Idaho territory, described as follows, to wit: Being the right of way of plaintiff's railroad, consisting of a strip of land 200 feet in width, or 100 feet on each side of the following-described center line as the same is located; beginning at station 3677 on plaintiff's line of railroad as definitely located, at Wallace, in said county, and running thence south 45 deg. 35 min. east, 370 feet to a point; thence on a curve to the left, having a radius of 955.4 feet, a distance of 355.8 feet, to a point; thence south 67 deg. 56 min. east, 418.9 feet to a point; thence on a curve to the right, having a radius of 1,432.7 feet, a distance of 473 feet to a point; thence south 49 deg. 1 min. east, 806.6 feet to a point; thence on a curve to the left, having a radius of 716.8 feet, a distance of 718.8 feet to a point; thence north 73 deg. 29 min. east, 956.9 feet to station 3718. Also for the sum of $1,000 damages for now unlawfully withholding the said premises from plaintiff from August 1st, 1887, and for the sum of $5,000, being the value of the rents, issues and profits of the said premises from August 1st, 1887, and while plaintiff has been excluded therefrom by the defendant, and for costs of suit.

And you are also notified that unless you appear and answer to said complaint within ten days after the service hereof, if served within Shoshone county, and within twenty days, if served
8 out of said county, but within said judicial district, and within forty days, if served out of said district (exclusive of the day of service) the plaintiff will take default against you and apply to the court for the relief demanded in the complaint herein.

Given under my hand and the seal of the district court of the first judicial district of Idaho Territory, in and for Shoshone county, this 15th day of May, A. D. 1889.

[SEAL.] F. H. GRIERSON, *Clerk*,
By JOHN P. SHEEHY, *Deputy*.

OFFICE OF THE SHERIFF OF THE COUNTY OF SHOSHONE, *ss*:

I hereby certify that I received the within summons on the 16th day of May, A. D. 1889, and personally served the same on the 23d day of May, A. D. 1889, on the within-named defendants, being the defendants named in the said summons, by delivering to and leaving with J. R. Stephens, the authorized agent of said defendants, personally, in the said county of Shoshone, a copy of said summons, and with defendants' said agent a true and correct copy of the complaint in the action named in said summons.

Dated this 27th day of May, A. D. 1889.

By R. A. CUNNINGHAM, *Deputy*.

Endorsed: No. 23. No. 526 original. Summons. District court, county of Shoshone. The Washington & Idaho Railroad Company, plaintiff, against The Cœur d'Alene R. & N. Co. *et al.*, defendants. Filed on return, May 18, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorney- for
9 plaintiff. Filed April 7, 1891. A. L. Richardson, clerk.

Separate Answer of Defendant The C. D. Railway & Navigation Company.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY, a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants.

The defendant, The Cœur d'Alene Railway & Navigation Company for itself alone answering the complaint of the plaintiff herein.

First. For answer to the allegations contained in the first subdivision of said complaint this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether the plaintiff was at the times mentioned in the complaint or at any

other time a corporation duly or otherwise, organized under the laws of Washington Territory and therefore denies the same.

Second. Admits that all the times mentioned in said com-
10 plaint this defendant was a corporation, duly organized under -he laws of the Territory of Montana, as alleged in the second subdivision of said complaint.

Third. For answer to the allegations contained in the third subdivision of said complaint, this defendant denies that on the 10th day of July, 1887, or at any other time, the plaintiff was lawfully or otherwise possessed as owner in fee-simple or otherwise, of the tract of land described in said subdivision, or of any interest therein or to any part thereof.

Fourth. For answer to the allegations contained in the fourth subdivision of said complaint this defendant admits that it went into possession of said tract of land, but alleges that it entered into possession thereof long prior to the first day of August, 1887, and admits that it, this defendant, has ever since remained and now is in the possession thereof, but denies that the plaintiff was ever in any manner possessed of said premises or any part thereof, and denies that this defendant on the first day of August, 1887, or at any other time or in any manner, ousted or ejected the plaintiff from said premises or any part thereof and denies that this defendant now unlawfully withholds the possession of said premises or any part thereof from the plaintiff.

Fifth. For answer to the allegations contained in the fifth subdivision of said complaint, this defendant denies that the value of the rents, issues and profits of the said premises from the first day of August, 1887, and while the plaintiff has been excluded therefrom, or for any other time, is five thousand dollars or any sum, whatsoever.

11 Sixth. For answer to the allegations contained in the seventh subdivision of said complaint, this defendant denies that the plaintiff is still, or at all, the owner in fee-simple, or in any manner, or entitled to the possession of the premises described in the complaint, or any part thereof, or of any interest therein.

And, for further answer to said complaint, and by way of a cross-complaint for affirmative relief, this defendant alleges that the plaintiff ought not to maintain this suit. For that, heretofore, to wit: in the months of July and August, 1887, this defendant, at great expense, to wit: at a cost of over seven thousand dollars, graded and constructed its railroad on, and upon, and near what is described in plaintiff's complaint as the center line of its railroad, over the premises described in the complaint, and laid the ties and rails thereon, and also partly constructed a depot for its said railroad thereon.

That, said railroad was graded, and said ties and rails laid thereon, and said depot partly constructed in good faith, and with the belief, on the part of this defendant, that it was the owner of the premises described in the complaint, and without any knowledge on the part of this defendant that the plaintiff had or claimed any interest therein. That, at the time of making said grade, and the laying of the ties and rails upon said portion thereof, and of the construc-

tion of said portion of said depot upon said premises, the plaintiff, through its authorized engineers, employés and officers, were present, and saw, and knew that this defendant was constructing its road and depot thereon, and, although the plaintiff was then
12 fully aware of its own claim to said premises, yet the plaintiff did not make known to this defendant that it, the plaintiff, had, or made any claim to said premises, but, on the contrary, carelessly and negligently stood by and permitted this defendant to construct its railroad and depot thereon, and this defendant alleges, upon information and belief that said plaintiff stood by, as aforesaid, and permitted this defendant to so construct its railroad upon and over said premises without objection, with the express intention to take the possession thereof from this defendant, and to utilize and appropriate said grade and railroad to its, the plaintiff's use, for its railroad, to the great damage, injury and annoyance of this defendant, and this defendant says that it would be contrary to equity or good conscience for the plaintiff to be now permitted to maintain this action, or to have the possession of said premises.

Wherefore this defendant prays the judgment of this court:

First. That the plaintiff take nothing by this action.

Second. That the plaintiff be estopped from claiming title to, or possession of, the premises described in the complaint, or any part thereof, or any interest therein, and that the title to said premises be forever quieted in this defendant.

Third. That this defendant have such other and further relief in the premises as may be just and equitable, together with the costs of this action.

ALBERT ALLEN,
Attorney for Defendant The Cœur d'Alene Railway & Navigation Company.

13 TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

John R. Stephens, being duly sworn, says that he is the assistant engineer of The Cœur d'Alene Railway & Navigation Company, one of the defendants in the foregoing-entitled action, and the agent of said company, and as such has charge of the construction department of said defendant. That none of the principal officers of said company are now within this county. That he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be upon information and belief, and as to those matters he believes — to be true.

J. R. STEPHENS.

Subscribed and sworn to before me this 31st day of May, A. D. 1889.

J. E. ANGEL,
Justice of the Peace for Wallace Precinct.

Endorsed: No. 526. No 23. District court, Shoshone county. The Washington & Idaho Railroad Company *v.* The Cœur d'Alene Railway & Navigation Company, *et al.* Separate answer of defendant, The C. d'A. R. & N. Co. Filed June 1, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy, this 3d day of June, 1889. Woods & Heyburn, plaintiff's attorneys. Albert Allen, attorney for C. d'A. R'y & N. Co. Filed April 7, 1891. A. L. Richardson, clerk.

14 *Demurrer.*

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION CO., a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants. } No. 526.

The plaintiff demurs to the portion of the answer called the cross-complaint, and to the same matter styled the cross-complaint of the Cœur d'Alene Railway & Navigation Company, for cause of demurrer, sets down the following:

First. The said portion of said answer, or cross-complaint, does not state facts sufficient to constitute any defense, nor does it state facts sufficient to constitute a cause of action herein.

Plaintiff prays judgment of its said demurrer.

WOODS & HEYBURN,
Attorneys for Plaintiff.

Endorsed: No. 23. No. 526. In district court, Shoshone county, Idaho. The Washington & Idaho R. R. Co. *v.* The Cœur d'Alene R. & N. Co. *et al.* Demurrer. Copy received June 11, 1889.
15 Albert Allen, attorney for C. d'A. R. & Nav. Co. Filed June 11, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorneys for plaintiff. Filed April 7, 1891. A. L. Richardson, clerk.

Stipulation.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
vs.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY *et al.*, Defendants.

It is hereby stipulated by and between the plaintiff and the defendant, The Cœur d'Alene Railway & Navigation Company, in the

above-entitled action, that the following testimony, heretofore taken in an action in the district court of the first judicial district of the Territory of Idaho, in and for the county of Shoshone, wherein the plaintiff herein was plaintiff and the defendant, The Cœur d'Alene Railway & Navigation Company and George P. James, were defendants, and afterwards certified on appeal to the supreme court of said Territory, and as the same appears in said transcript on appeal in the office of the clerk of the supreme court of the State of Idaho, may be used as evidence on the trial of this action, to wit:

The affidavit of P. Zaner, on pages 18 to 22 inclusive, of said transcript.

16 The affidavit of W. H. Burrage and exhibit thereto, on pages 25 to 31, both inclusive, of said transcript.

The map "A," page 48 of said transcript.

The affidavit of P. Zaner, pages 55 to 57, both inclusive, of said transcript.

The affidavit of W. H. Burrage and the two exhibits thereto, pages 60 to 67, both inclusive, of said transcript.

The cross-examination of W. H. Burrage, on pages 74 to 83, both inclusive, of said transcript.

The testimony of D. C. Corbin, on pages 85 to 103, both inclusive, of said transcript.

The testimony of Geo. P. James, on pages 104 to 120, both inclusive, of said transcript.

The testimony of P. Zaner, on pages 121 to 125, both inclusive, of said transcript.

The map marked Exhibit "A," between pages 152 and 153, of said transcript.

The two maps found between pages 176 and 177, of said transcript.

And it is stipulated that if the use of said transcript cannot be had, then and in that case a copy of said evidence, certified by the clerk of said supreme court, may be used instead.

It being understood, however, between the parties hereto that nothing herein shall prevent either party from offering any other evidence in this cause which they may see fit.

No objection of either party to said testimony from said transcript shall be made on account of form or by reason of being by

17 affidavit. But the parties reserve the right to object to the relevancy or substance the same as if the witness was present.

Dated this 20th day of May, 1892.

D. C. LOCKWOOD,
Attorney for Plaintiff.
McBRIDE & ALLEN AND
A. HAGAN,
Attorneys for Defendant The Cœur d'Alene Railway & Navigation Company.

Endorsed: No. 23. Circuit court. Washington & Idaho Railway Company *v.* Cœur d'Alene Railway Company *et al.* Stipulation. Filed May 23d, 1892. A. L. Richardson, clerk.

Notice.

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and The Northern Pacific Railroad Company, Defendants. } No. 526.

To the said plaintiff and to Messrs. Woods and Heyburn, attorneys for the said plaintiff:

You and each of you will please take notice that there is now on file in the said court, in said cause, a petition for the removal and transfer of said cause to the circuit court of the United States,
18 district of Idaho, ninth judicial circuit, together with a bond, or undertaking, on removal, and that we will call the same up for hearing on Friday, the 29th day of August, 1890, at the opening of court on said day, or as soon thereafter as counsel can be heard.

MITCHELL, ASHTON &
ALBERT HAGAN,
Attorneys for Defendants.

Service of the above notice with copy of the attached petition, *and* was accepted August 27th, 1890.

WOODS & HEYBURN,
Attorneys for Plaintiff.

Endorsed: In the district court of the first judicial district of the State of Idaho, in and for Shoshone county. The Washington & Idaho R. R. Co. *v.* The C. d'A. R'y & Nav. Co. *et al.* Notice.

Petition for Removal.

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

THE WASHINGTON & IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

Petition for removal to the circuit court of the United States.

To the Honorable Willis Sweet, judge of said court:

Your petitioners, The Cœur d'Alene Railway & Navigation
19 Company, and The Northern Pacific Railroad Company, the

defendants in the above-entitled action, come now and allege to the court and to your honor:

That they are the defendants in the above-entitled action, and pray and request that an order be made and entered in this court, removing this action to the circuit court of the United States for the ninth judicial circuit, district of Idaho, together with all files and records relating thereto, for proceeding in said action before that court, and that the further proceedings in this court in said action be discontinued.

That the request of said defendants is based upon the provisions of an act to provide for the admission of the State of Idaho into the Union. Approved July 3rd, 1890.

And further alleging herein, your petitioners show:

First. That your petitioner, The Northern Pacific Railroad Company, is a corporation created and organized and existing under, and by virtue of an act of Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, by a northern route." Approved July 2nd, 1864.

Second. That your petitioner, The Cœur d'Alene Railway & Navigation Company, is a railway corporation created and organized and existing under and by virtue of the laws of the State of Montana, and has been organized as such corporation since the 5th day of July, 1886, and doing business in the Territory, now State of Idaho, with its principal place of business at Helena, State of Montana.

20 Third. That the plaintiff herein, The Washington & Idaho Railroad Company, is a corporation organized and existing under and by virtue of the laws of the Territory, now State of Washington, and has been such corporation from and prior to the commencement of this action.

Fourth. That this action was commenced in the district court of the first judicial district of the Territory of Idaho, in and for the county of Shoshone, and was there pending on the 3rd day of July, 1890, when the said Territory of Idaho became a State under the authority granted by the act of Congress entitled "An act to provide for the admission of the State of Idaho into the Union." Approved July 3rd, 1890.

Fifth. That your petitioner, The Northern Pacific Railroad Company, is not a citizen or resident of the State of Idaho, nor has it been such a citizen or resident at any time since the commencement of this action. That the said Cœur d'Alene Railway & Navigation Company is not a citizen of the State of Idaho, nor has it been such at any time since the commencement of this action. That the said Washington & Idaho Railroad Company, the plaintiff herein, is now and ever has been, since the commencement of this action, a citizen of and a resident of the now State of Washington.

Sixth. That this action brings before the court a controversy arising between citizens of different States and corporations organized under the laws of different States.

21 Seventh. That this is a suit of a civil nature arising under the laws of the United States, and that the same is now pending in the State court and is properly within the jurisdiction of the circuit court of the United States for the ninth judicial circuit, district of Idaho, and that said action is brought in ejectment to oust and eject the defendants from the grounds known as the Wallace depot grounds, as described in the complaint herein to which reference is made, and for damages for the detention of the said ground.

Eighth. That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Wherefore, your petitioners pray that the order of transfer may be made and the further proceedings in this action discontinued in this court.

NORTHERN PACIFIC RAILROAD COMPANY,
By JOHN DORSEY,
Its Superintendent of Cœur d'Alene Division, Idaho.
CŒUR D'ALENE R'Y & NAVIGATION CO.,
By ALBERT HAGAN, *Its Attorney.*
MITCHELL, ASHTON & ALBERT HAGAN,
Attorneys for Petitioners and Defendants.

STATE OF IDAHO, }
County of Shoshone, } *ss:*

Albert Hagan, being first duly sworn upon oath, deposes and says, that he is one of the attorneys for The Northern Pacific Railroad Company and The Cœur d'Alene Railway & Navigation Company, the defendants in the above-entitled action, they being the petitioners herein.

22 That he has read the foregoing petition and knows the contents thereof and believes the same to be true.

ALBERT HAGAN.

Subscribed and sworn to before me this, the 27th day of August, 1890.

BARRY N. HILLARD,
Notary Public.

Endorsed: No. 23. No. 526. In the district court of the first judicial district of the State of Idaho, in and for Shoshone county. The Washington & Idaho Railroad Company *vs.* The Cœur d'Alene Railway & Navigation Company *et al.* Petition for removal. Filed August 27, 1890. E. H. Grierson, clerk, by Barry N. Hillard, deputy. Filed April 7, 1891. A. L. Richardson, clerk.

Removal of Cause Bond.

Know all men by these presents, that we, the Northern Pacific Railroad Company, (by its attorney, Albert Hagan) as principal, and Charles Hussey, banker of Wallace, in the county of Shoshone, and State of Idaho, as surety, are held and firmly bound unto the Washington & Idaho Railroad Company, in the penal sum of three

hundred dollars, lawful money of the United States, for the payment of which, well and truly — be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

Whereas, the Northern Pacific Railroad Company, principal above named, has petitioned the district court of Shoshone county, in the State of Idaho, for the removal of a certain suit therein pending, wherein The Washington & Idaho Railroad Company is plain-
23 tiff, and the said The Northern Pacific Railroad Company is one of the defendants, into the circuit court of the United States for the ninth circuit, district of Idaho.

Now therefore, the condition of this obligation is such that if the above-bounden The Northern Pacific Railroad Company shall enter and file, or cause to be entered and filed, in the next circuit court of the United States, in and for the ninth circuit district of Idaho, on the first day of its next session, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit, or action, now pending in the said district court of Shoshone county, and State of Idaho, in which The Washington & Idaho Railroad Company is plaintiff, and The Northern Pacific Railroad Company is one of the defendants, and shall pay all costs that may be awarded by said circuit court if said circuit court shall hold that said cause was wrongfully, or improperly removed thereto, and shall also appear in said circuit court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the act of Congress in that behalf, are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void, otherwise of force.

Witness our hands and seals, this 29th day of August, 1890.

THE NORTHERN PACIFIC
RAILROAD COMPANY,
By ALBERT HAGAN, *Attorney.*
[SEAL.] CHARLES HUSSEY.
[SEAL.]

24 STATE OF IDAHO, } ss:
Shoshone County, }

Charles Hussey, being duly sworn, says that he is a resident and householder within the said county and State, and worth the sum of three hundred dollars over and above all debts and liabilities which he owes or has incurred, and exclusive of property exempt from levy and sale under execution.

CHARLES HUSSEY.

Sworn to before me this 27th day of August, 1890.

[SEAL.] BARRY N. HILLARD,
Notary Public.

UNITED STATES OF AMERICA, } ss.:
District of Idaho, }

I hereby certify that on this 27th day of August, 1890, before me personally came and appeared Albert Hagan, attorney for the principal in the within bond, personally known to me, and known to me to be the person in, and who, executed the foregoing bond as for the said principal, and that he thereupon acknowledged that he executed the same in the manner and form and for the purposes therein mentioned, for said Northern Pacific Railroad Company.

[SEAL.] BARRY N. HILLARD,
Notary Public.

STATE OF IDAHO, } ss:
Shoshone County, }

I hereby certify that on this 27th day of August, 1890, before me personally came and appeared Charles Hussey, to me well known, and known to me to be the person in, and who, executed the foregoing bond as surety, and thereupon acknowledged to me that he executed the same in the manner and form and for the purpose therein mentioned.

[SEAL.] BARRY N. HILLARD,
Notary Public.

25 Endorsed: No. 23,526. —— court of —— county. Washington & Idaho R. R. Co. *vs.* Northern Pacific R. R. Co. Removal of cause bond. Filed this 27th day of August, 1890. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Approved. Filed April 7th, 1891. A. L. Richardson, clerk. —— ——, attorney for petitioner.

In the United States Circuit Court, Ninth Circuit, in and for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiffs,
vs.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

This action came on for trial before the court on the 23d day of May, A. D., 1892, upon the issues joined by the complaint and the separate answer of the defendant, The Cœur d'Alene Railway & Navigation Company, the defendant, The Northern Pacific Railroad Company, not having been served, and not appearing in the case; D. C. Lockwood, Esq., appearing as counsel for the plaintiff, and McBride & Allen and Albert Hagan appearing as counsel for the defendant, The Cœur d'Alene Railway & Navigation Company.

By consent of counsel in open court, the cause was tried without a jury, a jury having been expressly waived by both parties.

26 Whereupon, the court, after hearing all the proofs of the respective parties, and the arguments of counsel for each party,

and the cause having been submitted to the court for its decision, the court took the cause under advisement.

And now, on this 6th day of December, 1892, the court, after having fully read and considered the pleadings, and fully considered the testimony, and being fully advised in the premises, finds and makes the following findings of fact and conclusions of law therefrom, to wit:

Findings of Fact.

First. That on the 6th day of July, 1886, the defendant, The Cœur d'Alene Railway & Navigation Company, filed its articles of incorporation in the office of the secretary of the Territory (now State) of Montana, and also filed in the office of the county clerk and recorder of the county of Lewis and Clarke, in said Territory, a certified copy of its said articles of incorporation, which articles of incorporation, are in words and figures, following, to wit:

TERRITORY OF MONTANA, } *ss*:
County of Lewis and Clarke, }

We, Daniel C. Corbin, Samuel T. Hauser, Anton M. Holter, of the city of Helena, in the counties of Lewis and Clarke, Territory of Montana, Stephen S. Glidden, of Spokane Falls, Washington Territory, James F. Wardner, of Wardner, in the Territory of Idaho, James Monaghan, of Cœur d'Alene, Idaho Territory, and Alfred M. Esler, of said Helena, Montana, do by these presents pursuant to and in conformity with article 3 of chapter 15 of the Revised
27 Statutes of Montana, entitled "railroad corporations," and all acts supplemental thereto or amendatory thereof, associate ourselves together and form a corporation for the purpose of locating, constructing, maintaining and operating railroads in the Territories of Montana and Idaho, and to that end we do hereby certify as follows:

First. The name of such corporation by which it shall be known shall be "the Cœur d'Alene Railway & Navigation Company."

Second. The termini of said railroad are to be located in the county of Missoula, Territory of Montana, and in the counties of Kootenai and Shoshone, in the Territory of Idaho, and, if said corporation shall so determine, termini may also be located in the county of Nez Perces, in said Territory of Idaho; said railroad shall pass through said counties of Missoula, Kootenai and Shoshone, and if said corporation shall so determine, then said railroad shall also pass through said county of Nez Perces, and the general route of said railroad shall be as follows: Commencing at or near the town of Thompson's Falls, in said county of Missoula, or at some convenient point between said Thompson's Falls and the western boundary line of said Territory of Montana; thence running westerly or southwesterly to that certain tributary of Cœur d'Alene river known as the South fork; thence down the South fork and Cœur d'Alene river to Old Mission, connecting with steamboats or other water craft, to be owned and operated by said corporation, said

steamboats or other craft to ply between said Old Mission and the town of Cœur d'Alene; and if said corporation shall so determine, then said railroad shall again commence at said town of Cœur d'Alene and run northwesterly to Rathdrum, in said county of Kootenai, or such point on the line of the Northern Pacific railroad between Rathdrum and the western boundary of Idaho Territory as said corporation may hereafter determine with the right and privilege, if said corporation shall see proper, to run a branch or extension of said road in a southerly direction from said Shoshone county to the said county of Nez Perces; said steamboats or other water craft between the points in that behalf above specified to be used in connection with and as constituting a part of said railroad.

Third. The amount of capital stock necessary to construct such roads, including said connections, is five hundred thousand dollars, divided into five thousand shares of one hundred dollars each.

Fourth. The principal place of business of said corporation in the Territory of Montana, shall be at Helena, in the county of Lewis and Clarke, and principal place of business of said corporation in the Territory of Idaho shall, until otherwise fixed by the board of directors of said corporation, be at Cœur d'Alene, in the said county of Kootenai.

In witness whereof, we have hereunto set our hands and seals, this first day of July, in the year of our Lord one thousand eight hundred and eight-six.

DANIEL C. CORBIN. [SEAL.]
SAMUEL T. HAUSER. [SEAL.]
ANTON M. HOLTER. [SEAL.]
JAMES MONAGHAN. [SEAL.]
A. M. ESLER. [SEAL.]
J. F. WARDNER. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

On this fifth day of July, A. D. one thousand eight hundred and eighty-six, personally appeared before me, Massena Bullard, a notary public in and for said Territory, Daniel C. Corbin, Samuel T. Hauser, and Anton M. Holter, whose names are subscribed to the foregoing instrument as the parties thereto, personally known to me to be the same persons described in, and who executed the said foregoing instrument as parties thereto, and who, each of them, duly acknowledged to me that they each, of them, respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] MASSENA BULLARD,
Notary Public in and for the Territory of Montana.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

On this first day of July, A. D. one thousand eight hundred and eighty-six, personally appeared before me M. C. Athey, a notary public in and for said Territory, A. M. Esler and J. F. Wardner, whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the same persons described in, and who executed the said foregoing instrument as parties thereto, and who, each of them, duly acknowledge to me that they, each of them, respectfully, executed the same freely and voluntarily and for the uses and purposes therein mentioned.

30 In witness thereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] M. C. ATHEY,
Notary Public in and for the Territory of Idaho.

TERRITORY OF IDAHO, } ss:
County of Kootenai, }

On this 3rd day of July, A. D. 1886, personally appeared James Monaghan of Cœur d'Alene, in said county and Territory, personally known to me to be the real person who executed the foregoing instrument, and that he acknowledged the same to be his free act and deed for the uses and purposes therein expressed.

[SEAL.] ISAAC S. DALY,
Notary Public.

Filed for record in the office of the secretary of Montana, July 6th, at 2.30 o'clock p. m., A. D. 1886.

WM. B. WEBB,
Secretary of Montana.

Second. That the line of route of the railroad of the said Cœur d'Alene Railway & Navigation Company as described in said article of incorporation, passes over and includes the ground in controversy in this action.

Third. That on the 20th day of July, 1886, the defendant, The Cœur d'Alene Railway & Navigation Company, filed in the office of the Secretary of Interior, at Washington, D. C., a certified copy of its said articles of incorporation, and proofs of its organization under the laws of the Territory (now State) of Montana, which certified copy of articles of incorporation and proofs of organization were duly approved on that day by the honorable Secretary of the Interior.

31 Fourth. That in the summer and fall of 1886, the defendant, The Cœur d'Alene Railway & Navigation Company, constructed its railroad over said line of route as described in said articles of incorporation, from the said Old Mission up the main Cœur d'Alene river to the town of Kingston, and thence up the South fork of the Cœur d'Alene river to the town of Wardner Junc-

tion, a distance of about fourteen miles; and that in the month of October, 1886, the said defendant, The Cœur d'Alene Railway & Navigation Company, for the purpose of extending its line of railroad, caused a survey to be made for its said line of railroad from said Wardner Junction, up the said fork of the Cœur d'Alene river over the line described in its said articles of incorporation, through the towns of Wallace and Mullen, and marked the center line of said road upon the ground by planting stakes at each station at one hundred feet, and at such other points as there were angles in the line, so that the line of route of said road could be readily traced upon the ground, and that the said surveying and marking of said line was completed on the 31st day of October, 1886. That in making said survey the engineers of said Cœur d'Alene Railway & Navigation Company ran three lines through said town of Wallace called lines "A," "B" and "C," said lines "A" and "B" both being on the south side of the South fork of the Cœur d'Alene river, and the said line "C" being on the north side of said river, and being the line upon which the railroad of the Cœur d'Alene Railway &
Navigation Company was afterwards constructed, and upon
32 the ground now in controversy in this action. That in the month of October, 1886, and about one week after the commencement of said survey by the engineers of the said Cœur d'Alene Railway & Navigation Company, W. H. Burrage, an engineer, with a party of assistants claiming to be acting for the plaintiff, commenced surveying a line of route for a railroad from near the town of Wardner, up the South fork of the Cœur d'Alene river, to the said town of Mullen, and that, in making said survey, the said Burrage and the party assisting him, were several days and several miles behind the engineers surveying for the defendant, The Cœur d'Alene Railway & Navigation Company; and that in surveying their line through the town of Wallace, said Burrage surveyed the same on the north side of said river and over the ground in controversy; and that said Burrage and party also marked their line in a similar manner to what the engineers of the Cœur d'Alene Railway & Navigation Company had done, and that said Burrage and party completed their survey on the 5th day of November, 1886, and that said portion of said line run by said Burrage over the ground in controversy was run on the 28th day of October, 1886, and that said line "C" run by the engineers of the said Cœur d'Alene Railway & Navigation Company over the land in controversy was run on the 29th day of October, 1886; and that all of the parts of the line of the Cœur d'Alene Railway & Navigation Company, except said line "C," was run and marked prior to the line run by the said Burrage, said line "C" being run by the engi-
neers of the Cœur d'Alene Railway & Navigation Company,
33 as an amendment after they had completed the survey to the town of Mullen.

Fifth. That in the summer and fall of 1887, the defendant, The Cœur d'Alene Railway & Navigation Company, extended its road from the town of Wardner Junction over its line of survey, a point about one mile east of the town of Wallace, and over said line "C,"

the ground in controversy in this action, through the town of Wallace; and at all times thereafter, up to and at the time of the commencement of this action, occupied and used the same as a railroad and for railroad purposes; and at the time of the commencement of this action had its road-bed and track, and side tracks and depot thereon, and was using the same exclusively for railroad purposes.

Sixth. That at all the times *the* above mentioned, the lands in controversy, and all other lands along the line of said railroad of the defendant, The Cœur d'Alene Railway & Navigation Company, as described in its articles of incorporation, were unsurveyed public lands of the United States.

Seventh. That on the 7th day of July, 1886, the articles of incorporation of the plaintiff, The Washington & Idaho Railroad Company, were filed in the office of the secretary of the Territory (now State) of Washington; that by said articles of incorporation so filed the plaintiff was authorized to construct a railroad from the town of Farmington, in Washington Territory, by the most practical route in general northerly direction, to a point at, or near the town of Spokane Falls (now Spokane), in said Washington Territory, together with the following branch lines tributary thereto:

34 From a junction with the said main line at the forks of Hangman creek, near Lone Pine, in said Washington Territory, in a general northeastern direction, across the Cœur d'Alene Indian reservation, to a point near the mouth of St. Joseph's river on Cœur d'Alene lake; thence in a northerly direction along the east side of Cœur d'Alene lake to the Cœur d'Alene river; thence in a general easterly direction to Cœur d'Alene river; thence in a general easterly direction to Cœur d'Alene mission; thence in a southeasterly direction, by the valley of the South fork of the Cœur d'Alene river to Wardner, in Idaho Territory.

Second. From a junction with said main line, at or near the town of Spangle in Washington Territory, in a generally northeasterly direction, to a point on Cœur d'Alene lake, about five miles north of the mouth of the Cœur d'Alene river in said Idaho Territory, and to maintain and operate such railroads and telegraph lines and branches thereof, carry freight and passengers thereon and receive tolls therefor.

Eighth. That the said line of railroad as described in the said articles of incorporation of the plaintiff, nor any of the branches thereof, did not cover or include the ground in controversy, or any part thereof, or of the valley of the South fork of the Cœur d'Alene river adjacent thereto; that the eastern terminus of the said branch of railroad running in the direction of the town of Wallace, as described in said articles, was at the town of Wardner, a distance of about fifteen miles westerly from the town of Wallace, and from the land in controversy herein.

35 Ninth. That afterwards, to wit: on the 10th day of November, 1886, and after the completion of said survey by said Burrage, and the said survey by the engineers of the defendant, The Cœur d'Alene Railway & Navigation Company, over the premises in controversy herein, the plaintiff filed in the office of the sec-

retary of the Territory (now State) of Washington, supplemental articles of incorporation, which supplemental articles of incorporation provided for a branch line of its railroad from the town of Milo (which is near Wardner), in Shoshone county, Idaho, following the South fork of the Cœur d'Alene river to the town of Mullen, in said Territory, a distance of about twenty miles, which extension would pass over the premises in controversy.

Tenth. That on the 22nd day of December, 1886, the plaintiff filed in the office of the Secretary of the Interior at Washington, D. C., a copy of its said articles of incorporation and a copy of the statute of the Territory of Washington, under which the plaintiff's incorporation was made and proof of its organization.

Eleventh. That from the time of the making of the said survey by said Burrage, over the land in controversy, on the 28th day of October, 1886, until long after the completion of the railroad, side tracks and depot of the defendant, The Cœur d'Alene Railway & Navigation Company, upon the ground in controversy, neither the said Burrage, nor the plaintiff, nor any person for them, or either of them, ever made any other survey, or did any other act upon
36 the premises in controversy, or took any possession thereof; and that the first act done by said Burrage, or the plaintiff, upon said premises thereafter, was the survey made thereon in the year 1888, by the plaintiff; and that at that time, the railroad and the side track and depot of the defendant, The Cœur d'Alene Railway & Navigation Company, was fully constructed thereon, and had been so constructed, and thereon, since the fall of 1887; and the defendant, The Cœur d'Alene Railway & Navigation Company, was in full and complete operation and possession thereof, and of the grounds in controversy herein.

Twelfth. That the public surveys of the Government were not extended over the land through which said surveys were made until in the month of July, 1891.

Thirteenth. That on the 9th day of November, 1886, the defendant, The Cœur d'Alene Railway & Navigation Company, filed in the United States land office at Cœur d'Alene, Idaho, a map, or profile of that portion of its railroad running through the town of Wallace, which was approved by the Secretary of the Interior December 3, 1886, and that upon said map, or profile, said line "B," through said town of Wallace, was platted as the line of route of said road; that line "C" was, in fact, and intended to be a definite line of location thereof, but that said line "B" was so platted by a mistake, and that said mistake was not discovered until after the completion of said railroad and side track and depot upon and over the ground in controversy herein, and that the filing of said plat, show-
37 ing said road to run over said line "B," was not done for the purpose of, in any manner, deceiving the plaintiff, or any one else, but was done by a mistake, as aforesaid; and that the plaintiff was not, in any manner, misled or prejudiced by the filing of said plat, or by said mistake.

Conclusions of Law.

First. That at the time of the making of the said survey by W. H. Burrage over the lands in controversy, on the 28th day of October, 1886, the plaintiff was not a corporation organized for the purpose of constructing, or authorized to construct, a railroad over the ground in controversy, or any part thereof, or at any point easterly of the town of Wardner, in Shoshone county, Idaho Territory; was not authorized to take any possession of the premises in controversy, or to locate a line of road thereon; and its said survey on the 28th day of October, 1886, conferred no right whatever on it, the plaintiff, as against the defendant, The Cœur d'Alene Railway & Navigation Company.

Second. That, at the time of the construction of the railroad of the defendant over the lands in controversy, the same were unsurveyed public lands of the United States, and were subject to be appropriated by the defendant, The Cœur d'Alene Railway & Navigation Company, as and for its right of way under the act of March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," and that by reason of the compliance by the defendant, The Cœur d'Alene Railway & Navigation Company, with the said act of Congress, and its
38 construction of its railroad thereon, it became the owner of the premises in controversy herein, and the whole thereof, as a right of way under said act of Congress, and that it has been at all times since said construction of said road, in the fall of 1887, up to the commencement of this action, and still is the owner of and in possession of, and entitled to the possession and use of the same.

Third. That the defendant, The Cœur d'Alene Railway & Navigation Company, is now, and at all times since the 6th day of July, 1886, has been a corporation, duly organized and existing under the laws of the Territory (now State) of Montana, for the purpose of locating, constructing, maintaining and operating a railroad through the valley of the South fork of the Cœur d'Alene river, in Shoshone county, Idaho, and over the land in controversy herein; and that on the 20th day of July, 1886, said defendant duly filed in the office of the Secretary of the Interior at Washington, D. C., a certified copy of its articles of incorporation and due proofs of its organization, under the same, which certified copy of articles of incorporation and proofs of organization were on that day duly approved by the honorable Secretary of the Interior, and was in all respects in accordance with the provisions of the act of Congress, entitled "An act granting to railroads the right of way through the public lands of the United States." Approved, March 3rd, 1875; and that by reason thereof the said defendant on said 20th day of July, 1886, became entitled to a right of way one hundred feet in
39 width on each side of the center line of its railroad, to be constructed through and over the public lands between the termini of its railroad, and upon the line of route thereof, as described in its said articles of incorporation.

Fourth. That the survey made by the plaintiff over the lands in controversy, in the year 1888, was without authority of law, and unauthorized, for the reason that the said premises had already been appropriated by the defendant, The Cœur d'Alene Railway & Navigation Company.

Fifth. That the plaintiff is not, and at no time has been the owner of, or entitled to the possession of the premises in controversy, and described in the complaint in this action, or any part thereof.

Sixth. That the rights of the defendant, The Cœur d'Alene Railway & Navigation Company, in and to the premises in controversy herein, are prior and superior to any rights of the plaintiff.

Seventh. That the plaintiff, The Washington & Idaho Railroad Company, is not entitled to take anything by this action, and the defendant, The Cœur d'Alene Railway & Navigation Company, is entitled to a judgment in its favor, and for costs herein; and it is so ordered.

JAS. H. BEATTY, *Judge.*

December 6, 1892.

Endorsed: In the United States circuit court, ninth circuit, in and for the district of Idaho. The Washington & Idaho Railroad Co., plaintiff, *v.* The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, defendants. Findings of fact and conclusions of law. Filed December 6th, 1892. A. L. Richardson, clerk.

40 *Judgment.*

In the United States Circuit Court, Ninth Circuit, in and for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

This action having come on for trial at the April term, 1892, of the above court, at Boisé City, Idaho, on the 23rd day of May, 1892, D. C. Lockwood, Esq., appearing for the plaintiff, and McBride & Allen and Albert Hagan appearing for the defendant, The Cœur d'Alene Railway & Navigation Company, the defendant, The Northern Pacific Railroad Company, not having been served and not appearing in the action; and the cause having, by consent of counsel, been tried to the court without a jury, a jury having been expressly waived, and the court having heard all the proofs of the respective parties and the arguments of counsel, and the court thereafter on the 6th day of December, 1892, having made and filed its findings of fact and conclusions of law herein, whereby it appears that the plaintiff is not entitled to the relief demanded in the complaint, or to take anything by this action; and that defendant, The Cœur d'Alene Railway & Navigation Company, is entitled to judgment herein and for its costs herein.

41 Now therefore, on motion of McBride & Allen and Albert Hagan, attorneys for the defendant, The Cœur d'Alene Railway & Navigation Company, it is ordered and adjudged that the plaintiff, The Washington & Idaho Railroad Company, take nothing by this action and that the defendant, The Cœur d'Alene Railway & Navigation Company, have judgment against the said plaintiff for its costs herein, taxed at $209.10.

BY THE COURT.

Done and dated this 6th day of December, A. D. 1892.

JAMES H BEATTY, *Judge.*

Endorsed: In the United States circuit court, ninth circuit, in and for the district of Idaho. The Washington & Idaho Railroad Company, plaintiff, *v.* The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, defendants. Judgment. Filed December 6th, 1892. A. L. Richardson, clerk.

In the Circuit Court of the United States for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

I, the undersigned clerk of the circuit court of the United States for the district of Idaho, do hereby certify that the foregoing
42 papers hereto annexed, constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 6th day of December, 1892.

[SEAL.] A. L. RICHARDSON, *Clerk.*

In the Circuit Court of the United States for the District of Idaho.

Judgment-roll No. 23.

THE WASHINGTON & IDAHO RAILROAD COMPANY
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY.

Register No. 23.
Filed December 6, 1892.

A. L. RICHARDSON, *Clerk.*

In the Circuit Court of the United States, District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY *et al.*, Defendants.
} Opinion and Decision.

D. C. Lockwood, attorney for plaintiff.
McBride & Allen and Albert Hagan, attorneys for defendants.

43 This action is ejectment for a railroad right of way, consisting of a strip of ground 200 feet wide by 4,100 feet long, at the town of Wallace, Idaho, and on the unsurveyed public lands of the United States.

Only the first-named defendant appears in this action, and each party for its claim to the premises in controversy, relies upon the provisions of the act of Congress, approved March 3rd, 1875, (1 Sup. R. S. 91) by section one of which, it is provided that the right of way through the public lands "is hereby granted to any railroad duly organized under the laws of any State or Territory, which shall have filed with the Secretary of the Interior, a copy of its articles of incorporation and due proof of its organization under the same."

The construction of this statute cannot be the subject of doubt, it requires the performance of certain conditions, prior to the operation of the grant, the right is not to a corporation to be, but to one that is organized, not to one which shall subsequently file its articles of incorporation and due proof of its organization, but to that which has done so. The Government simply makes an offer which ripens into a grant or a contract the instant the prescribed conditions are performed. An attempt to exercise the privilege, does not, through relation, become a vested right by a subsequent performance of those conditions, but the several steps recited in the statute, the organization of the company and the due filing of its articles of incorporation, and the proof of such organization, must be taken by any corporation before it can obtain any claim whatever to such right of way over the public lands, and any of its acts or
44 claims made to procure such right prior to a compliance with the statutory conditions, being without the authority of law, can confer no rights, and certainly not as against the company which does comply with the law. Attention has not been directed to any construction of this statute by the national courts, but the foregoing views may be inferred from, if not fully sustained by New B. & C. R. R. Co. *v.* P. G. & C. R. R. Co., 105 Pa. St. 13.
Red River &c. R. R. Co. *v.* Sture, 20 N. W. Reps. 229.
Savannah F. & W. R. R. Co. *v.* Davis, 7 So. Repr. 30, and
Larson *v.* O. R'y & Nav. Co. 23 Pac., 976.

From the testimony it appears the plaintiff company was organized July 3rd, 1886, under the laws of Washington Territory, but whether duly organized according to those laws has not been shown,

nor are they as they then existed, now accessible to the court, but from the fact that plaintiff in its articles of incorporation set out in some detail, the general description of the proposed route its road would take, it may be presumed the statute of said Territory provided, as most statutes upon the same subject do, that such route and the termini must be described in the articles of incorporation. It appears by plaintiff's said articles that its proposed road was to run from a point in said Territory to the town of Wardner, in Shoshone county, Idaho, which did not include the right of way, or ground in controversy. It follows, therefore, by plaintiff's own showing, that when it was so organized, it was not for the purpose of building a road over this ground, and that it did not then
45 claim any right of way over it. It did, however, by supplemental articles of incorporation, entered into on the 8th day of November, 1886, provide for an extension of its road through the town of Wallace over the premises in controversy, and therein described the route of the same, this latter date is therefore the earliest at which plaintiff was organized to build a road over such premises.

That plaintiff has filed with the Secretary of the Interior copies of its articles of incorporation, original and supplemental, and due proof of its organization, is not clearly shown. The only evidence tending to establish such facts is what is certified by the Commissioner of the General Land Office to be a copy of a communication of the president of plaintiff company addressed to the Secretary of the Interior, on December 2nd, 1886, in which it is stated that he transmits therewith to said Secretary, "a copy of the articles of incorporation," and a copy of the Washington statutes under which the incorporation was made, which bears an endorsement of its receipt of the Interior Department on the 22nd day of December, 1886, and that it "encloses copy of articles of incorporation and due proof of organization." While this is not an explicit statement that a copy of the supplemental articles was also filed, yet it may be admitted it was included, and it follows that the 22nd day of December, 1886, was the earliest date when, by compliance with the other conditions of the statute, the plaintiff was fully authorized to enter upon the disputed premises, for the purpose of claiming or occupying them as a right of way for its road.
46 Upon this last-named date, the grant from the Government would take effect, provided such premises were then unclaimed public land.

The defendant, The Cœur d'Alene Railway & Navigation Company, was incorporated under the laws of Montana, a Territory, on the 6th day of July, 1886, and in its articles describes and includes as a portion of its proposed railroad route the premises in question. On the 20th day of the same month it filed with the Secretary of the Interior a copy of its said articles and a copy of the Montana statutes under which it was incorporated, copies of both of which, officially certified to by the Commissioner of the General Land Office, are in evidence. Section 301, of said Montana statutes, provides that the due incorporation of a company shall, without fur-

ther proof or acts, operate as its organization, hence filing with the Secretary proof of the incorporation, operated also as proof of the organization.

It then appears that defendant by said 20th day of July had fully complied with the statute and was on that date authorized to take any steps necessary for the possession and acquisition of the right of way in controversy, and in this respect was prior to plaintiff. In October 29, 1886, defendant ran the survey of its line over such premises, being the day after the plaintiff surveyed its route over practically the same line. But, as before concluded, the plaintiff was not authorized to take any possession of the premises prior to the 22d day of December, 1886. The said survey, on the 28th of October, 1886, conferred no rights whatever upon it as against defendant.

47 It was also urged by plaintiff that defendant surveyed three different lines at said town of Wallace indicated on exhibit as "A," "B" and "C," the last being the one in dispute, and that on the 8th day of November, 1886, it filed in the local land office a plat of its route in which line "B" was indicated as the one adopted and that plaintiff was thereby misled, to its injury.

The evidence shows that the filing of line "B" was not to deceive plaintiff, but was done by mistake, and that "C" was the line adopted, and the one of which it was intended to file a plat. But can plaintiff complain of this? The only provision of said act of Congress requiring the filing of such plat in the local land office is that of section 4, directing that within 12 months after the location of any section of twenty miles of road, if upon surveyed lands, or if upon unsurveyed lands, within 12 months after the survey thereof by the United States, the plat of same shall be so filed.

It may be doubted that the filing of such plat is required for the purpose of giving notice to others who may desire to occupy such lands, but as such filing is not required until after the lands are surveyed, it seems more probable that it is to operate as notice to the Government that it may seclude from its sales of lands, such located rights of way. However this may be, it appearing at the time above named the lands were unsurveyed, the defendant was not required to file any plat. But it further appears that plaintiff,

48 after making its unauthorized survey on said 28th day of October, did no other act upon the premises, or took any possession thereof, until it made another survey in the year 1888, prior to which defendant had completed its road over said premises and was in full operation and possession of the same. Plaintiff cannot, therefore, complain that it was misled, or damaged by such erroneous filing of its plat. The judgment must be that plaintiff take nothing by this action, and that defendant recover its costs, and it is so ordered. BEATTY, *Judge*.

Endorsed: In the circuit court of the United States for the district of Idaho. The Washington & Idaho R. R. Co. *v.* The Cœur d'Alene R. & Nav. Co. *et al.* Opinion and decision. Filed October 21, 1892. A. L. Richardson, clerk.

In the Circuit Court of the United States for the Ninth Circuit in and for the District of Idaho.

WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
v.
CŒUR D'ALEN*f* RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

Assignments of Errors.

The Washington & Idaho Railroad Company, the plaintiff in error herein, having petitioned said court for an order permitting it to prosecute a writ of error to the honorable, the United
49 States circuit court of appeals for the ninth circuit, from the judgment made and entered in such cause, now makes and files with its said petition the following, and specifies the same as its assignments of errors herein, and upon which it will rely for a reversal of the judgment upon the said writ, and says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the circuit court of the United States for the ninth circuit, in and for the district of Idaho, there is manifest error in this, to wit:

I.

The court erred in hearing the said cause and in entering up judgment therein against the Washington & Idaho Railroad Company, and in favor of the said Cœur d'Alene Railway & Navigation Company, and the said judgment is void and of no effect, and the court had no jurisdiction to hear and determine the said cause and enter up judgment therein, for the following reasons, to wit:

First. That, this action was originally commenced by the Washington & Idaho Railroad Company in the district court of the first judicial district for the Territory of Idaho, in and for Shoshone county, in said Territory, long prior to the admission of the said Territory of Idaho as a State into the Union, and the said action was pending in the said district court of Idaho, aforesaid, at the time the said Territory of Idaho was admitted as a State into the Union. That soon after the admission of the said Territory
50 of Idaho into the Union as a State the said Cœur d'Alene Railway & Navigation Company, and the Northern Pacific Railroad Company petitioned the said district court for the first judicial district for the State of Idaho, in and for the county of Shoshone, the successor of the said territorial court in which such action was commenced, for a transfer of this action to the circuit court of the United States for the ninth judicial circuit, in and for the district of Idaho, for the purpose of removing this action to the said circuit court of the United States, together with all files, records and proceedings relating thereto and praying that all further proceedings in the said circuit court of the State of Idaho be discontinued. That the said action was undertaken to be transferred or removed from the district court of the State of Idaho to the cir-

cuit court of the United States for the ninth judicial circuit, in and for the District of Idaho, under the provisions of an act of Congress of the United States, approved July 3, 1890, and entitled, "An act to provide for the admission of the State of Idaho into the Union." That after the filing of the said petition for removal or transfer, the said action was removed or transferred from the said district court of the State of Idaho into and to the said circuit court of the United States for the ninth judicial circuit in and for the district oi Idaho, and the said United States circuit court aforesaid proceeded to hear and determine the matters and things in issue in said action and rendered the judgment herein now sought to be set aside. That, at the time of the commencement of this action in the district court of the first judicial district of the Territory of Idaho, in and for
51 Shoshone county, the States of Idaho, Montana and Washington had not been admitted to the Union and were still Territories. That, as is alleged in the said petition for removal, and, as is shown by the record in this section, the Washington & Idaho Railroad Company was a corporation, organized and existing under the laws of Washington Territory, and the defendant, The Cœur d'Alene Railway & Navigation Company, was a corporation, organized and existing under the laws of Montana Territory, and at the time of the commencement of the said action, the said Washington & Idaho Railroad Company was not a citizen of any State of the United States, or of any foreign country, and the said Cœur d'Alene Railway & Navigation Company was not a citizen of any of the United States or of any foreign country, but the said Washington & Idaho Railroad Company was a citizen of the Territory of Washington, and a resident therein, as is shown by the said petition for removal and the record in this cause, and the said Cœur d'Alene Railway & Navigation Company was a resident and citizen of the Territory of Montana, as is shown by the said petition for removal and the record in this cause. That it nowhere appears in and by the said petition for removal, or transfer, or the record in said action transferred, that the said circuit court of the United States for the ninth judicial circuit, district of Idaho, had jurisdiction, original or otherwise, of the said action at the time it was so removed, or transferred, or would have had jurisdiction, original or otherwise of the said action at the time the same was commenced had the
52 said United States circuit court for the ninth judicial circuit, district of Idaho, been in existence at the time of the commencement of the said action, but, on the contrary, it appears that in and by the said petition for removal, or transfer and the record in the said action, and such is the fact, that the said United States circuit court for the ninth judicial circuit, district of Idaho, had no original jurisdiction of the said action, or of the parties thereto, and that the said action could not have been commenced in the United States circuit court for the ninth judicial circuit, district of Idaho, had the said court been in existence at the time of the commencement of the said action, or at any other time during the pendency of the said action. That it is not shown by the said petition for removal or transfer, that the said defendants, or either of them were,

at the commencement of this action, or at the time of the transfer thereof, or now, inhabitants of the district of Idaho, but, on the contrary, it is alleged by the said petition for removal and transfer, that all of the parties to the said action are residents and inhabitants of other districts, and it is not alleged, or shown by the said petition for removal, or transfer, or by the record in the said cause that either the plaintiff or either of the defendants resided in the district of Idaho; but, on the contrary, it is expressly alleged by the said petition for removal, or transfer, and shown by the record in the said cause, and such is the fact, that the plaintiff was, at the time of the commencement of the said action, and at the time of the said removal and now is, a citizen and resident of the State of Washington,
53 and not a citizen or resident of the district of the State of Idaho, and that neither of the said defendants are citizens or residents of the said district of the State of Idaho. Neither is it denied in the said petition that the said Northern Pacific Railroad Company was, at the commencement of this action, or at the time of the said transfer, or now is, a banking corporation, organized and existing under and by virtue of the laws of the United States. That the jurisdiction of the United States district court for the ninth judicial circuit, district of Idaho, does not affirmatively appear in the petition for removal or transfer, or in the record of this action; but that on the contrary, it affirmatively appears that at the time of the commencement of this action, and at the time of the said pretended transfer or removal, that the said United States circuit court for the ninth judicial circuit, district of Idaho, was without jurisdiction to hear and determine the said action, or enter any judgment therein, except a judgment remanding the said action to the district cout of the first judicial district of the State of Idaho, in and for the county of Shoshone.

II.

The court erred in hearing and determining this action and in entering judgment therein, and the said judgment is void for the reason that the jurisdiction of the said circuit court of the United States for the ninth judicial circuit, district of Idaho, nowhere appears in the petition for transfer or removal, filed in this
54 action by the defendants, The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, undertaking to remove this action from the district court of the first judicial district of the State of Idaho, in and for the county of Shoshone, to the said United States circuit court for the ninth judicial circuit, district of Idaho, and such jurisdiction nowhere appears in the record in this action, and the said United States circuit court for the ninth judicial circuit, district of Idaho, is and was, and at all times has been, without jurisdiction to hear and determine this action, or enter judgment therein.

III.

The United States circuit court for the ninth judicial district of Idaho erred in hearing and determining and entering up judgment

in this action, and had no jurisdiction to hear and determine the same and enter up judgment therein, for the reason that at the time of the commencement of this action the said United States circuit court for the ninth judicial circuit, district of Idaho, would not have had jurisdiction of the same under the laws of the United States, had such court existed at the time of the commencement of such action, for the following reasons, to wit:

First. At the time of the commencement of this action, the Washington & Idaho Railroad Company, as is shown by the record in this action and by the petition for removal, was a corporation organized and existing under the laws of Washington Territory and was a resident and citizen of the said Territory and was not a resident or citizen of any State of the United States, and was not
55 a resident or citizen of the then Territory, now State, of Idaho, and the said Cœur d'Alene Railway & Navigation Company, one of the defendants herein, as appears by the petition for removal and the record in this action, was at the time of the commencement of this action, a resident and citizen of the then Territory of Montana, and was not a resident or citizen of the Territory, now State, of Idaho, or an inhabitant thereof.

IV.

The findings of facts made by the court, and each and all of the same, are insufficient to support the judgment entered by the said court in this action.

V.

The court erred in finding so much of the thirteenth finding of fact as shows that the said line "C," mentioned in the said finding, was intended to be a definite line of location thereon, but that the said line "B" was so platted by a mistake, and that the filing of the said plat showing the said road to run over said line "B" was not done for the purpose of, in any manner, deceiving the plaintiff or any one else, but was done by a mistake as aforesaid, and that the plaintiff was not, in any manner, misled or prejudiced by the filing of said plat, or by said mistake, for the reason that the said finding is immaterial and irrelevant, and is not a finding upon any of the issues in the said action.

VI.

The court erred in the first conclusion of law made and filed herein by the court, for the following reasons, to wit:

56 First. For the reason that the said conclusion of law does not correctly state the law applicable to the facts found by the court in this action, and is contrary to law.

Second. That, the said conclusion of law is not authorized by the facts found.

VII.

The court erred in its second conclusion of law made and filed herein, in so far as it concludes that at the time of the construction

of the railway of the defendant over the land in controversy, the same were unsurveyed public lands of the United States, and were subject to the appropriation by the defendant, The Cœur d'Alene Railway & Navigation Company, as, and for its right of way under the act of March 3rd, 1875, entitled, "An act granting to railroads a right of way through the public lands of the United States," for the following reasons, to wit:

First. The said conclusion does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. The said conclusion is not authorized by the facts found by the court, but is inconsistent therewith.

VIII.

The court erred in the second conclusion of law made, and filed herein by the court, in so far as the court there concludes that the defendant, The Cœur d'Alene Railway & Navigation Company, had ever complied with the said act of Congress of March 3rd,
57 1875, mentioned in the said conclusion of law, for the following reasons, to wit:

First. There were no facts found by the court authorizing such conclusion of law.

Second. The said conclusion of law is inconsistent with the facts found by the court.

IX.

The court erred in the second conclusion of law, made and filed herein by the court, in so far as by such second conclusion of law, the court holds that by reason of the compliance by the defendant, The Cœur d'Alene Railway & Navigation Company, with the said act of Congress or the construction of its railroad thereon, it became the owner of the premises in controversy therein, and the whole thereof, as a right of way under the said act of Congress, for the following reasons to wit:

First. That the said conclusion of law is not authorized by the facts found by the court.

Second. The said conclusion of law does not correctly state the law applicable to the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court, and

Fourth. For the reason that it affirmatively appears by the finding of fact made by the court that the said defendant, The Cœur d'Alene Railway & Navigation Company, did not comply with the said act of Congress, and did not, and could not, become the owner of any of the premises in controversy herein.

58 X.

The court erred in its second conclusion of law, made and filed herein by the court, in so far as the court holds in said finding that the said defendant at all times since the construction of its road, in the fall of 1887, to the commencement of this action, and at the

same time of the rendition of the judgment herein, was, and is the owner of and in possession of and entitled to the use and possession of the same, for the following reasons, to wit:

First. The said conclusion of law does not state correctly the law applicable to the facts found by the court in this action, and it is contrary to law.

Second. The said conclusion of law is not authorized by the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court.

XI.

The court erred in its second conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. The said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Such conclusion of law is not authorized by the facts found by the court.

XII.

59 The court erred in its fourth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. Said conclusion of law does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. Said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized by the facts found by the court, nor supported by such facts found by the court.

Fourth. The said conclusion of law does not correctly state the law for the reason that it is found by the court that the said Cœur d'Alene Railway & Navigation Company had already appropriated a right of way, shown by the line "B," mentioned in the finding of fact by the court, parallel with the said line "C" and had filed a map of the said line "B" in the United States land office at Cœur d'Alene, Idaho, which said map was duly approved by the Secretary of the Interior, as found in the thirteenth finding of fact, and the said Cœur d'Alene Railway & Navigation Company had no right, power or authority under the said act of Congress to appropriate or use any other right of way than the said line "B" shown upon the said map so filed and approved and which, as shown by the findings of the court, did not cover or include any part of the premises in controversy.

XIII.

The court erred in its fifth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

60 First. The said conclusion of law does not state the law applicable to the facts found by the court, and is contrary to law.

Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Said conclusion of law is not authorized by the facts found by the court.

XIV.

The court erred in its sixth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. Said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. Said conclusion of law is not supported by the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court.

XV.

The court erred in the seventh conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. The said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. That the said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized or supported by the facts found by the court.

61

XVI.

The court erred in entering the judgment, "The Washington & Idaho Railroad Company take nothing by this action, and the defendant, The Cœur d'Alene Railway & Navigation Company, have judgment against the said plaintiff for its costs," for the following reasons, to wit:

First. The said court had no jurisdiction to enter the said judgment, or any judgment in this action.

Second. The said judgment so entered is contrary to law.

Third. Said judgment is not supported by the facts found by the court, and is inconsistent therewith.

Wherefore, by reason of the foregoing assignments of errors, the said Washington & Idaho Railroad Company prays that the judgment rendered in this cause, in the said circuit court of the United States for the ninth circuit, in and for the district of Idaho, be reversed, set aside and held for naught.

____ ____,

Attorneys for The Washington & Idaho Railroad Company, Plaintiff in the Above-entiled Action.

Endorsed: (Original.) No. 23. In the circuit court of the United States, district of Idaho. W. & I. R. R. Co., plaintiff, *v.* Cœur d'Alene R'y & Nav. Co. and N. P. R. R. Co., defendant-. Assignment of errors. Due service of the within assignment by certified copy as prescribed by law, is hereby admitted at Spokane, this 21st day of April, 1893. McBride & Allen, attorneys for defendant-. Filed April 17, 1893. A. L. Richardson, clerk.

62 In the Circuit Court of the United States for the Ninth Ci
cuit in and for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants.

Petition for Allowance of a Writ of Error.

To the honorable the judges of the United States circuit court i
and for the ninth circuit, district of Idaho:

The petition of The Washington & Idaho Railroad Company
above-named plaintiff, humbly prays for a writ of error of th
United States circuit — of appeals for the ninth circuit directed t
the circuit court of the United States for the district of Idaho, com
manding the said court to return the same with a true copy of th
record, assignments of error and all proceedings in the above-en
titled cause, wherein the said Washington & Idaho Railroad Com
pany is plaintiff, and the said Cœur d'Alene Railway & Navigatio
Company and The Northern Pacific Railroad Company are defend
ants, thereto attached, in order that the judgment in the said caus
may be reviewed by such circuit court of appeals. And your pe
titioner, the above-named plaintiff, The Washington & Idaho Rai
road Company, represents that in the records, proceedings and als
in the rendition of the judgment in the above-entitle
63 cause, manifest error hath happened in the matters an
things more specifically set forth in your petitioner's assign
ments of error filed herewith, to the great damage and injury o
your petitioner, and your petitioner assigns the following errors
upon which it will rely to reverse said judgment, to wit:

I.

That the court erred in hearing the said cause, and in enterin
up judgment therein against your petitioner, and in favor of th
said Cœur d'Alene Railway & Navigation Company, and the sai
judgment is void and of no effect, and the court had no jurisdictio
to hear and determine the said cause, and enter up judgment therei
for the following reasons, to wit:

First. That, this said action was originally commenced by you
petitioner, The Washington & Idaho Railway Company, in the dis
trict court of the first judicial district of the Territory of Idaho, i
and for Shoshone county, in said Territory, long prior to the admis
sion of the said Territory of Idaho as a State into the Union, an
the said action was pending in the said district court of the Terri
tory of Idaho, aforesaid, at the time the said Territory of Idaho wa
admitted as a State into the United States. That, soon after the ad
mission of the said Territory of Idaho into the Union as a State
the said Cœur d'Alene Railway & Navigation Company, and th
Northern Pacific Railroad Company, petitioned the said distric

court for the first judicial district for the State of Idaho, in and for the county of Shoshone, the successor of the said territorial
64 court, in which such action was commenced, for a transfer of this action to the circuit court of the United States for the ninth judicial circuit, in and for the district of Idaho, for the purpose of removing this action to said circuit court of the United States, together with all files, records and proceedings relating thereto, and praying that all further proceedings in the said district court of the State of Idaho be discontinued. That said petition for removal is part of the judgment-roll and record in this cause, and your petitioner, for greater certainty, humbly prays leave to refer thereto as part of this petition. That the said action was undertaken to be transferred or removed from the district court of the State of Idaho to the circuit court of the United States, for the ninth judicial circuit, in and for the district of Idaho, under the provisions of an act of Congress of the United States, approved July 3rd, 1890, and entitled "An act to provide for the admission of the State of Idaho into the Union." That after the filing of the said petition for removal or transfer, the said action was removed or transferred from the said district court of the State of Idaho, into, and to the said circuit court of the United States for the ninth judicial circuit, for the district of Idaho, and the said United States circuit court, aforesaid, proceeded to hear and determine the matters and things in issue in the said action and rendered the judgment herein, now sought to be set aside. That at the time of the commencement of this action in the district court of the first judicial district of the Territory of Idaho, in and for Shoshone county, the States of Idaho, Montana and
65 Washington had not been admitted to the Union and were still Territories. That, as is alleged in the said petition for removal, and as is shown by the record in this action, the Washington & Idaho Railroad Company was a corporation organized and existing under the laws of Washington Territory, and the defendant, The Cœur d'Alene Railway & Navigation Company, was a corporation organized and existing under the laws of Montana Territory, and at the time of the commencement of the said action, the said Washington & Idaho Railroad Company was not a citizen of any State of the United States or of any foreign country, and the said Cœur d'Alene Railway & Navigation Company was not a citizen of any of the United States or of any foreign country, but the said Washington & Idaho Railroad Company was a citizen of the Territory of Washington and a resident therein, as is shown by the said petition for removal and the record in this cause, and the said Cœur d'Alene Railway & Navigation Company was a resident and citizen of the Territory of Montana, as is shown by the said petition for removal and the record in this cause. That it nowhere appears in and by the said petition for removal, or transfer, or the record in said action so transferred, that the said circuit court of the United States for the ninth judicial circuit, district of Idaho, had jurisdiction, original or otherwise, of the said action at the time it was so removed or transferred, or would have had jurisdiction, original or otherwise, of the said action at the time the same was commenced,

had the said United States circuit court for the ninth judicial
66 circuit, district of Idaho, been in existence at the time of the commencement of the said action, but, on the contrary, it appears that in and by the said petition for removal, or transfer, and the record in the said action, and such is the fact, that the said United States circuit court for the ninth judicial circuit, district of Idaho, had no original jurisdiction of the said action, or of the parties thereto, and that the said action could not have been commenced in the said United States circuit court for the ninth judicial circuit, district of Idaho, had the said court been in existence at the time of the commencement of the said action, or at any other time during the pendency of said action. That it is not shown by the said petition for removal, or transfer, that the said defendants, or either of them were, at the commencement of this action, or at the time of the transfer thereof, or now, inhabitants of the said district of Idaho, but, on the contrary, it is alleged by the said petition for removal and transfer, that all of the said parties to the said action are residents and inhabitants of other districts, and it is not alleged or shown by the said petition for removal or transfer, or by the record in the said cause, that either the plaintiff, or either of the defendants resided in the district of Idaho, but, on the contrary, it is expressly alleged by the said petition for removal or transfer, and shown by the record in the said cause, and such is the fact, that the plaintiff was, at the time of the commencement of the said action, and at the time of the said removal, and now is, a citizen and resident of the State of Washington,
67 and not a citizen or resident of the district of the State of Idaho, and that neither of the said defendants are citizens or residents of the said district of State of Idaho. Neither is it denied in the said petition that the said Northern Pacific Railroad Company was, at the commencement of this action, or at the time of the said transfer, or now is, a banking corporation, organized and existing under and by virtue of the laws of the United States. That the jurisdiction of the United States district court for the ninth judicial circuit, district of Idaho, does not affirmatively appear in the petition for removal or transfer, or in the record of this action, but that, on the contrary, it affirmatively appears that at the time of the commencement of this action, and at the time of the said pretended transfer or removal, that the United States circuit court for the ninth judicial circuit, district of Idaho, was without jurisdiction to hear and determine the action or enter any judgment therein except a judgment remanding the said action to the district court of the first judicial district of the State of Idaho, in and for the county of Shoshone.

II.

That the court erred in hearing and determining this action and in entering judgment therein, and the said judgment is void, for the reason that the jurisdiction of the said circuit court of the United States for the ninth judicial circuit, district of Idaho, nowhere ap-

pears in the petition for transfer or removal, filed in this
68 action by the defendants, The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, undertaking to remove this action from the district court of the first judicial district of the State of Idaho, in and for the county of Shoshone, to the said United States circuit court for the ninth judicial circuit, district of Idaho, and such jurisdiction nowhere appears in the record in this action, and the said United States circuit court for the ninth judicial circuit, district of Idaho, is and was, and at all times has been, without jurisdiction to hear and determine this action or enter judgment therein.

III.

The United States circuit court for the ninth judicial district of Idaho erred in hearing and determining and entering up judgment in this action and had no jurisdiction to hear and determine the same and enter up judgment therein, for the reason that at the time of the commencement of this action, the said United States circuit court for the ninth judicial circuit, district of Idaho, would not have had jurisdiction of the same under the laws of the United States had such court existed at the time of the commencement of such action, for the following reasons, to wit:

First. At the time of the commencement of this action the Washington & Idaho Railroad Company, as is shown by the record in this action by the petition for removal, was a corporation organized and existing under the laws of Washington Territory, and was a resident and citizen of the said Territory, and was not a resi-
69 dent or citizen of any State of the United States, and was not a resident or citizen of the then Territory (now State of Idaho), and the said Cœur d'Alene Railway & Navigation Company, one of the defendants herein, as appears by the petition for removal and the record in this section, was at the time of the commencement of this action a resident and citizen of the then Territory of Montana, and was not a resident or citizen of the Territory, (now State) of of Idaho, or an inhabitant thereof.

IV.

That, the finding of facts made by the court, and each and all of the same, are insufficient to support the judgment entered by the said court in this action.

V.

That, the court erred in finding so much of the thirteenth finding of fact, as shows that the said line "C," mentioned in the said finding, was intended to be a definite line of location thereon, but that the said line "B" was so platted by a mistake, and, that the filing of the said plat, showing the said road to run over said line "B," was not done for the purpose of in any manner deceiving the plaintiff, or any one else, but was done by a mistake as aforesaid, and that the plaintiff was not, in any manner, misled or prejudiced

by the filing of said plat, or by said mistake, for the reason that the said finding is immaterial and irrelevant, and is not a finding upon any of the issues in the said action.

70 VI.

The court erred in the first conclusion of law made, and filed herein by the court, for the following reasons, to wit:

First. For the reason that the said conclusion of law does not state correctly the law applicable to the facts found by the court in this action, and is contrary to law.

Second. That, the said conclusion of law is not authorized by the facts found.

VII.

The court erred in its second conclusion of law made and filed herein, in so far as it concludes that at the time of the construction of the railway of the defendant over the lands in controversy, the same were unsurveyed public lands of the United States and were subject to be appropriated by the defendant, The Cœur d'Alene Railway & Navigation Company, as, and for its right of way under the act of March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," for the following reasons, to wit:

First. The said conclusion does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. The said conclusion is not authorized by the facts found by the court, but is inconsistent therewith.

71 VIII.

The court erred in the second conclusion of law, made and filed herein by the court, in so far as the court there concludes that the defendant, The Cœur d'Alene Railway & Navigation Company, had ever complied with the said act of Congress of March 3, 1875, mentioned in the said conclusion of law, for the following reasons, to wit:

First. There were no facts found by the court authorizing such conclusion of law.

Second. The said conclusion of law is inconsistent with the facts found by the court.

IX.

The court erred in the second conclusion of law, made and filed herein by the court, in so far as by such second conclusion of law the court holds that by reason of the compliance by the defendant, The Cœur d'Alene Railway & Navigation Company, with the said act of Congress, or the construction of its railroad thereon, it became the owner of the premises in controversy therein and the whole thereof, as a right of way under the said act of Congress, for the following reasons, to wit:

First. That the said conclusion of law is not authorized by the facts found by the court.

Second. The said conclusion of law does not correctly state the law applicable to the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court, and

72 Fourth. For the reason that it affirmatively appears by the finding of fact made by the court that the said defendant, The Cœur d'Alene Railway & Navigation Company, did not comply with the said act of Congress, and did not, and could not, become the owner of any of the premises in controversy herein.

X.

The court erred in the second conclusion of law, made and filed herein by the court, in so far as the court holds in said finding that the said defendant, at all times, since the construction of its road in the fall of 1887, to the commencement of this action, and at the time of the rendition of the judgment herein, was, and is the owner of, and in the possession of, and entitled to the use and possession of the same, for the following reasons, to wit:

First. The said conclusion of law does not state correctly the law applicable to the facts found by the court in this action, and is contrary to law.

Second. The said conclusion of law is not authorized by the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court.

XI.

The court erred in its second conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. The said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

73 Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Such conclusion of law is not authorized by the facts found by the court.

XII.

The court erred in its fourth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. Said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. Said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized by the facts found by the court, nor supported by such facts found by the court.

Fourth. The said conclusion of law does not correctly state the law, for the reason that it is found by the court that the said Cœur d'Alene Railway & Navigation Company had already appropriated a right of way, shown by the line "B," mentioned in the finding of fact by the court, parallel with the said line "C," and had filed a

map of the said line "B" in the United States land office at Cœur d'Alene, Idaho, which said map was duly approved by the Secretary of the Interior, as found in the thirteenth finding of fact, and the said Cœur d'Alene Railway & Navigation Company had no right, power or authority, under the said act of Congress, to appropriate or use any other right of way than the said line "B," shown
74 upon the said map so filed and approved and which, as shown by the findings of the court, did not cover or include any part of the premises in controversy.

XIII.

The court erred in its fifth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. The said conclusion of law does not state the law applicable to the facts found by the court, and is contrary to law.

Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Said conclusion of law is not authorized by the facts found by the court.

XIV.

The court erred in its sixth conclusion of law, made and filed herein by the court, for the following reasons, to wit:

First. Said conclusion of law does not state correctly the law applicable to the facts found by the court, and is contrary to law.

Second. Said conclusion of law is not supported by the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court.

XV.

The court erred in the seventh conclusion of law, made and filed herein by the court, for the following reasons, to wit:
75 First. The said conclusion of law does not correctly state the law applicable to the facts found by the court, and is contrary to law.

Second. That the said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized or supported by the facts found by the court.

XVI.

The court erred in entering judgment "The Washington & Idaho Railroad Company take nothing by this action and the defendant, The Cœur d'Alene Railway & Navigation Company have judgment against the said plaintiff for its costs," for the following reasons, to wit:

First. The said court had no jurisdiction to enter the said judgment, or any judgment, in this action.

Second. The said judgment so entered is contrary to law.

Third. Said judgment is not supported by the facts found by the court, and is inconsistent therewith.

Wherefore, your petitioner prays that it may please your honors to grant unto your petitioners a writ of error to remove the said cause, and the record thereof, into the United States circuit court of appeals, for the ninth judicial circuit, to the end that the error, if any hath happened, may be duly corrected and full and speedy justice done your petitioner, and your petitioner in duty bound will ever pray.

D. C. LOCKWOOD AND
W. W. COTTON,
Attorneys for Plaintiff and Petitioner, The Washington & Idaho Railroad Company.

Let the writ of error issue as herein prayed.

JAS. H. BEATTY, *Judge.*

76 Endorsed: (Original) No. 23. In the circuit court of the U. S. dist. of Idaho. W. & I. R. R. Co., plaintiff, *v.* Cœur d'Alene R'y & Nav. Co., and N. P. R. R. Co., defendants. Petition for allowance of writ of error. Due service of the within petition by certified copy, as prescribed by law, is hereby admitted at Spokane, this 21st day of April, 1893. McBride & Allen, attorneys for defendants. Filed April 17th, 1893. A. L. Richardson, clerk.

In the Circuit Court of the United States of the Ninth Circuit in and for the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Appellant,
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Respondent-.

Know all men by these presents, that we, H. B. Eastman and Joseph Perrault, of Boisé City, Ada county, State of Idaho, are held and firmly bound unto the above-named Cœur d'Alene Railway & Navigation Company and the Northern Pacific Railroad Company, in the sum of five hundred ($500) dollars, to be paid to the said Washington & Idaho Railroad Company, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors, and administrators, jointly
77 and severally, firmly by these presents.

Sealed with our seals, and dated the 17th day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, the above-named Washington & Idaho Railroad Company has prosecuted an appeal to the United States circuit court, to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States for the district of Idaho.

Now, therefore, the condition of this obligation is such, that if the above-named Washington & Idaho Railroad Company shall prose-

cute said appeal to effect and answer all costs, if it fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] H. B. EASTMAN.
[SEAL.] JOSEPH PERRAULT.

STATE OF IDAHO, } ss:
County of Ada, }

H. B. Eastman and Joseph Perrault, being first duly sworn, depose and say, that they reside in Boisé City, county of Ada, and State of Idaho, and are freeholders therein, and worth the sum of five hundred dollars over and above all property exempt from sale on execution.

H. B. EASTMAN.
JOSEPH PERRAULT.

Subscribed and sworn to before me this 17th day of April, 1893.

[SEAL.] EDGAR WILSON,
Notary Public.

78 On this 17th day of April, 1893, in Boisé City, and county of Ada, before me, a notary public, in and for the county of Ada, personally appeared the above-named H. B. Eastman and Joseph Perrault, and then and there, each of them, severally acknowledged that he had executed the foregoing bond and for the purpose therein mentioned.

[SEAL.] EDGAR WILSON,
Notary Public.

The foregoing bond is approved.

JAS. H. BEATTY, *Judge.*

Endorsed: No. 23. In the circuit court of the United States of the ninth circuit, in and for the district of Idaho. Washington & Idaho Railroad Company, appellant, *v.* Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, respondent-. Filed April 18th, 1893. A. L. Richardson, clerk.

UNITED STATES OF AMERICA, ss:

To the Cœur d'Alene Railway & Navigation Company and the Northern Pacific Railroad Company and each of them, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the United States circuit — of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, on the fifteenth day of May, A. D. eighteen hundred and ninety-three, pursuant to writ of error, filed in the clerk's office of the circuit court of the United States for the ninth circuit, district of Idaho, wherein The Washington & Idaho Railroad Company is plaintiff in error, and you, and each of you, are defendants in error,

to show cause, if any there be, why the judgment in the
79 said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Jas. H. Beatty, judge of the district court of the United States and one of the judges of the said circuit court of the United States, presiding at the trial of the said action, this seventeenth day of April, A. D. 1893, and of the Independence of the United States the one hundred and seventeenth.

JAS. H. BEATTY,
Judge, One of the Judges of the Circuit Court of the United States Presiding at the Trial of the said Cause.

Endorsed: (Original) No. 23. In the circuit court of the United States, district of Idaho. The Washington & Idaho R. R. Co., plaintiff, *v.* Cœur d'Alene R'y & Nav. Co. and N. P. R. R. Co., defendants. Citation. Due service of the within citation by certified copy as prescribed by law, is hereby admitted at Spokane, this 21st day of April, 1893. McBride & Allen, attorneys for defendants. Filed April 24, 1893. A. L. Richardson, clerk.

In the Circuit Court of the United States of the Ninth Judicial Circuit, Central Division of the District of Idaho.

THE WASHINGTON & IDAHO RAILROAD COMPANY
v.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY. } No. 23.

I, A. L. Richardson, clerk of the circuit court of the United
80 States, in and for the district of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 75, inclusive, to be full, true and correct copies of the judgment-roll, opinion, assignment of errors, petition for writ of error, bond on writ of error and citation in the above-entitled cause, and that the same together constitute the return of the annexed writ of error.

Witness my hand and seal of said circuit court, affixed at Boisé City, Idaho, this 25th day of April, 1893.

[SEAL.] A. L. RICHARDSON, *Clerk.*

81 United States Circuit Court of Appeals for the Ninth Circuit.

WASHINGTON & IDAHO RAILROAD CO., Plaintiff in Error,
vs.
CŒUR D'ALENE RAILWAY & NAVIGATION CO. and THE NORTHERN PACIFIC RAILROAD CO., Defendants in Error.

W. W. Cotton, attorney for plaintiff in error; McBride & Allen and W. H. Francis, attorneys for defendant- in error.

Before Gilbert, circuit judge, and Knowles and Hawley, district judges.

GILBERT, *Circuit Judge:*

On May 15th, 1889, the Washington & Idaho Railroad Co. brought an action of ejectment in the district court of the first judicial district of the Territory of Idaho against the Cœur d'Alene R. & N. Co. for the recovery of a strip of land described as the right of way of the plaintiff's railway, being one hundred feet in width on each side of the described centre line of the plaintiff's road.

The complaint alleged that the Cœur d'Alene R. & N. Co. entered into possession of the described premises and ejected the plaintiff therefrom, and that the Northern Pacific Railroad Company
82 is in possession thereof as the tenant of its codefendant.

The Cœur d'Alene R. & N. Co. answered the complaint, denying the title of plaintiff and admitting that it, the said defendant, entered into possession of the premises and still held the same. The answer also pleaded estoppel, alleging that the Cœur d'Alene R. & N. Co. had constructed a railroad over the premises in question with the knowledge of the plaintiff.

A demurrer was filed by the plaintiff to the answer by way of estoppel on August 27, 1890, and the action was removed by the defendants into the circuit court of the United States for the district of Idaho. On May 23, 1892, the cause was tried before the court without a jury upon the complaint and the separate answer of the Cœur d'Alene R. & N. Co., and the court thereupon made findings of fact and conclusions of law in favor of the defendant The Cœur d'Alene R. & N. Co., adjudging that the plaintiff take nothing by the action and that the defendant have judgment for costs.

The plaintiff brings this writ of error to review that judgment. The first assignment of error is that the circuit court had no jurisdiction to hear or determine the cause.

The jurisdiction of the court is invoked by reason of the Federal question involved in the fact that the Northern Pacific Railroad Company, a Federal corporation, is a party to the action.

The statute under which Idaho was admitted into the Union was approved July 30, 1890. 26 Statutes at Large, 215, sec. 18, provides
"that in respect to all cases, proceedings, and matters now
83 pending in the supreme or district courts of said Territory at the time of the admission into the Union of the State of Idaho, and arising within the limits of said State whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed

at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of such supreme and district courts of said Territory."

It is argued that this action was not "pending" against the Northern Pacific Railroad Co., for the reason that that company was never served and never appeared in the action, and that the Federal character of the corporation can only give rise to a Federal question when the corporation is an actual party to the suit, actually present and engaged in the litigation.

It cannot be said that the Northern Pacific Company was not an actual party to the litigation. It was not only made a party, but it was a proper party. It was the party in possession of premises sought to be recovered by an action of ejectment. Its right of possession was determinable by the judgment to be rendered in that action. It was no less a party from the fact that in the action of ejectment by the law of Idaho, as by the law of many other States, the tenant in possession might, by disclosing his interest as tenant only, permit his landlord to defend the action. The object of the action was to obtain the possession of the premises described in the complaint and to obtain an adjudication in favor of the plaintiff's claim of title to the same. These objects could not be se-
84 cured without the presence of both the defendants.

The right to remove the cause under the statute above quoted is determined by the condition of the case at that time, not by the subsequent course of litigation. The enquiry is whether at the time Idaho was admitted to the Union this action was pending against both the defendants. An action is deemed to be pending from the time of its commencement until its final determination upon appeal. The action was commenced by filing the complaint. At the same time summons was issued to be served upon both the defendants. The return recites that service was made upon both the defendants. So far as the record shows, the return remained unchallenged until entry of the final judgment, which recites that no service had been made upon the Northern Pacific Company and that no appearance had been made by that defendant. At the time when the cause was removed the return of the service was on file, but no default had been taken against the Northern Pacific Company and no disposition had been made of the plaintiff's controversy against it; that defendant in presenting its petition for removal to the circuit court declared itself to be one of the defendants in the case, and recited the fact that the cause "is now pending in the State court, and is properly within the jurisdiction of the circuit court of the United States."

It is obvious that if the service upon that corporation were defective other service upon an alias summons could have been had before or after the removal, and it cannot be said that the action was not at the time of the removal pending as to both the defendants.

85 The fact that service was not subsequently had, and that no appearance was made in the cause by the Northern Pacific Company, and that a trial was had upon the answer of its codefend-

ant alone does not in our judgment affect the question under consideration.

It is further argued that even if it be conceded that the action was pending as to the Northern Pacific Company at the time of the admission of Idaho, still it does not affirmatively appear from the record that the jurisdictional facts existed at the commencement of the action, but that, on the contrary, the allegations of the petition for removal are all confined to the date of the petition itself. On the other hand, it is contended that the cause is removed not under the removal acts, but under the special provisions of the statute above quoted, which permits the removal upon the simple request in writing of a party to the suit, and that it is not necessary that the jurisdictional facts appear in the record; it is sufficient if they exist. We are unable to concur in this view. A "request in writing" and a petition are one and the same thing. When the rules governing the practice of the Federal courts are considered it is evident that Congress, in providing for the transfer of causes pending in the courts of Idaho, upon the written request of a party, intended that the request should perform the essential functions of a petition for removal under the removal acts, and that if the jurisdictional facts elsewhere appeared in the record a simple request in writing for the transfer would be sufficient. If these facts were not apparent from the record the request should advise the court
86 of the grounds upon which the jurisdiction is invoked. It was not contemplated that in the case of suits so removed from the courts of Idaho a departure should be made from the rule elsewhere uniformly observed that the jurisdictional facts must appear of record.

What are the jurisdictional facts that should be made to appear in this case? It was only necessary to show that one of the parties to the cause at the commencement of the action and at the time of the admission of Idaho was a Federal corporation, and that the amount in controversy exceeded two thousand dollars. These facts distinctly appear from the record. The complaint alleges that the Northern Pacific Company at all the times mentioned in the complaint was a corporation duly organized under the laws of the United States. The petition for removal alleges that that company is a corporation organized and existing under and by virtue of an act of Congress entitled "An act granting the lands, etc.," approved July 2, 1864. It necessarily follows from these averments that the Northern Pacific Company was a Federal corporation at the commencement of the action, on the date of the approval of the act admitting Idaho, and at all times since. There can be no pretence that that corporation was a nominal party conclusively joined as a defendant for the purpose of conferring jurisdiction upon the Federal courts, for at the commencement of the action no such removal was possible.

The other assignments of error challenge the correctness of the findings of the court below.

As there is no bill of exceptions presented in the record, the power

of this court on writ of error is limited to the consideration
87 of the question whether or not the findings of fact justify the conclusions of law arrived at by the trial court. It appears from the findings of fact that the plaintiff was organized under the laws of Washington July 3, 1886, with the power as expressed in its articles of incorporation to construct a railroad to the town of Wardner, in Shoshone Co., Idaho.

If its road had been constructed as described in the articles it would not have included the premises in controversy, but on the 8th day of Nov., 1886, the plaintiff company filed supplemental articles providing for an extension of its road through the town of Wallace over the premises in controversy. Before filing these articles, however, on the 28th day of October, 1886, the plaintiff caused its line of survey to be made locating its extension on the premises described in the complaint.

On the following day the defendant Cœur d'Alene R. & N. Co., a corporation created under the laws of Montana and having a legal status in Idaho, from and after the 20th day of July, 1886, surveyed its road through Wardner over practically the line adopted by the plaintiff.

It is obviously true, as found by the court below, that the survey made by the plaintiff on the 28th day of October, 1886, could confer no rights whatever as against the survey made on the 29th. At that time the plaintiff had not the power through its charter to construct a road over the premises in controversy. It had no such power prior to the 8th day of Nov., 1886.

The act of Congress under which both companies claim the right of way in question provides "that the right of way through
88 the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

It is plain that under this act no corporation could acquire a right of way upon any line not described in its charter or in its articles of incorporation, and it necessarily follows that no initiatory step could be taken to secure such right of way by the survey upon the ground or otherwise. Until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff corporation its acts in making survey were of no avail, and it follows that so far as the conflicting rights of these two corporations are concerned the status of the plaintiff is the same as if its survey of Oct. 20, 1886, had not been made.

It is further urged that as the findings show that the Cœur d'Alene R. & N. Co. surveyed three distinct lines at said town of Wallace known as lines A, B, and C, the last named being the line in dispute, and that, on the 8th day of Nov., 1886, it filed in the local land office a plat of its route adopting the line B, that the plaintiff was thereby misled to its injury. To this it may be said that such injury does not appear from any fact in the record. The

finding is that the plat of the line B was filed by mistake, and that the line C was the one actually adopted and intended to be
89 placed on record in the filed plat.

Sec. 4 of the act of Congress above referred to provides that within twelve months after the location of any section of 20 miles of road, if upon surveyed lands, or if upon unsurveyed lands within 12 months after the survey thereof by the United States, the plat of the same shall be filed. At that time the lands in controversy and all the lands along the line were unsurveyed public lands. In the summer and fall of 1887 the Cœur d'Alene R. & N. Co. completed its line of road over the land in controversy; no further survey was made by the plaintiff until 1888, and the plaintiff did nothing whatever on the premises in controversy in the way of constructing a road until that year.

It is contended that the rules and regulations of the Department of the Interior, issued Nov. 7, 1879, and in force during the period of this controversy, confined the Cœur d'Alene R. & N. Co. to the line of route adopted by its first map, and it is argued that while that company might not have been required under the act to file its map at the time such filing was made, yet it had the right to do so under the regulations of the Secretary of the Interior, and that when such map was approved by the Secretary the company thereupon "secured" the benefits of the act. In other words, that by the filing of the map upon line B the defendant secured the benefits of the act upon that line and could not thereafter alter its route so as to affect the rights of any other party.

In The United States *v.* Chaplain, 31 Fed., 890, Judge Deady said of these rules that "When they coincide with the law they
90 are superfluous and when they do not or go beyond it they are invalid." We find no warrant in the act for saying that a railroad company having adopted one line of survey along the route provided for in its articles of incorporation and having filed the plat thereof may not subsequently and within the time allowed it by law for so doing adopt another route, and no reason is apparent why instead of filing a second plat it may not construct its road on the line surveyed and adopted so long as the rights of others have not intervened.

In this case, as shown from the findings, no rights of the plaintiff had intervened prior to the actual construction of the road of the Cœur d'Alene R. & N. Co. upon the premises in controversy in this suit, and no error is apparent in the judgment rendered upon the findings of the court below.

The judgment is affirmed with costs to the defendant in error.

(Endorsed:) Opinion. Filed Febr'y 12, 1894. F. D. Monckton, clerk.

91 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1892.

WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff in Error,
vs.
CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY. } No. 113.

In error to the circuit court of the United States for the district of Idaho.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs to the defendants in error, and the cause is remanded to said circuit court for such further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) Judgment. Filed Febr'y 12, 1894. F. D. Monckton, clerk.

92 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE WASHINGTON & IDAHO RAILROAD CO., Plaintiff in Error,
vs.
THE CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants in Error.

The Washington & Idaho Railroad Company, plaintiff in the above-entitled action and the plaintiff in error in the circuit court of appeals of the United States for the ninth circuit, having obtained a writ of error to the Supreme Court of the United States from the judgment made and entered in the said cause by the said circuit court of appeals for the ninth circuit, now makes and files in addition to its assignment of errors made in connection with the writ of error from the circuit court of the United States for the ninth district of Idaho to the circuit court of appeals for the ninth circuit the following assignment of errors, and says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the circuit court of appeals for the ninth circuit there is manifest error, in this, to wit:

First. That the said circuit court of appeals erred in sustaining and affirming the judgment of the said circuit court of the
93 United States for the ninth circuit, district of Idaho.

Second. That the said circuit court of appeals erred in holding and determining that the United States circuit court for the ninth judicial circuit, district of Idaho, had acquired jurisdic-

tion to hear and determine the said cause, and the said circuit court of appeals erred in holding and determining that at the time the cause was attempted to be removed from the district court of the State of Idaho, which was successor to the territorial court prior to the admission of said State, to the United States circuit court for the district of Idaho by reason of the Northern Pacific Railroad Company being a party to the action a Federal question was involved, and the said circuit court of appeals erred in holding that an action was then pending against the Northern Pacific Railroad Company in the territorial district court of the Territory of Idaho at the time of the admission into the Union of the State of Idaho under the act by which Idaho was admitted into the Union, approved July 23, 1890, 26 Statutes at Large, page 215, on the ground and for the reason that the Northern Pacific Railroad Company was lessee of the premises in controversy claimed to be the property of the Cœur d'Alene Railway & Navigation Company, and in holding and determining that the action was pending as to both of the defendants and respondents herein within the provisions of section 18 of said act, when in fact the said Northern Pacific Railroad Company was not served and did not appear in said action in the United States circuit court of the ninth judicial district for the district of Idaho.

Third. The circuit court of appeals erred in holding and
94 determining that at the time of the admission into the Union of the State of Idaho any matter, proceeding, or cause was then pending in this action against the Northern Pacific Railroad Company whereof a United States circuit court would have had jurisdiction at the time of the commencement of said action had such a court then existed, and likewise in holding and determining that the United States circuit court established under the act under which Idaho was admitted into the Union, approved July 23, 1890, 26 U. S. Statutes at Large, page 215, acquired jurisdiction to hear and determine said cause as the successor of the territorial district court of the Territory of Idaho, the court in which said cause was then pending, as against the defendant The Cœur d'Alene Railway & Navigation Company.

Fourth. The circuit court of appeals erred in holding and determining that the articles in writing filed by the Cœur d'Alene Railway & Navigation Company and the Northern Pacific Railroad Company for the removal of said cause were sufficient to give the United States circuit court for the ninth judicial circuit, district of Idaho, created by the act of Congress admitting into the Union the State of Idaho, jurisdiction to hear and determine the said cause.

Fifth. The United States circuit court of appeals erred in holding and determining that the Cœur d'Alene Railway & Navigation Company had a legal status in the Territory of Idaho on the 20th day of July, 1886, or ever has had such a status in such Territory, now State, of Idaho as would authorize the said Cœur d'Alene Railway & Navigation Company on the 29th day of October, 1886,
95 or at any time prior or subsequent thereto to exercise the right of eminent domain within the said Territory or acquire

any rights by reason of a survey of line "C" on the eighth day of November, 1886, or by reason of attempted occupancy of said line "C" by its line of railway.

Sixth. The circuit court of appeals erred in holding and determining that the Washington & Idaho Railroad Company's right to occupy said line "C" for railroad purposes had not attached to said line "C" prior to the time when the Cœur d'Alene Railway & Navigation Company abandoned said line "B" and attempted to occupy said line "C."

Seventh. That the said circuit court of appeals erred in holding and determining that when the Cœur d'Alene Railway & Navigation Company filed a map of the route selected under the act of March 3, 1875, 18 Statutes at Large, page 482, and thereby designated line "C" as its line of definite location that the said line did not become a line of definite location or route on the maps of the public lands, and that line "C" did not become thereby ascertained and in place, and the Cœur d'Alene Railway & Navigation Company's right to this right of way in place was at once vested in the Cœur d'Alene Railway & Navigation Company, and erred in holding and determining that any other means than the map of definite location could be used to ascertain what lands passed for the purposes of the right of way for the Cœur d'Alene Railway & Navigation Company except the right of way found in the map of the line of the road filed with the register of the United States land office of the land district in which the land over which lines "B" and "C" are
96 located is situated under the provisions of the United States statutes above cited and the rules and regulations of the Land Department, and the circuit court of appeals erred in holding and determining that the filing of the map designating line "B" as the route which was approved by the Secretary of the Interior did not prevent the Cœur d'Alene Railway & Navigation Company from afterwards adopting a different route.

Eighth. The circuit court of appeals erred in holding and determining that the findings show that the rights of the Washington & Idaho Railroad Company to line "C" have not intervened and become fixed and in place prior to the construction and occupancy of any part of line "C" which is in controversy in this action by the Cœur d'Alene Railway & Navigation Company.

Ninth. The circuit court of appeals erred in holding and determining that no error was committed in the judgment rendered by the United States circuit court of the ninth judicial circuit for the district of Idaho upon the findings of the court or that there were sufficient findings to sustain said judgment.

Tenth. The circuit court of appeals erred in sustaining and affirming the action of the said circuit court in hearing the said cause and in entering up judgment therein against the Washington & Idaho Railroad Company and in favor of the said Cœur d'Alene Railway & Navigation Company, and the said judgment is void and of no effect, and the court had no jurisdiction to hear and determine the said cause and enter up judgment therein for the following reasons, to wit:

101 Eleventh. The circuit court of appeals erred in sustaining and affirming the action of the said circuit court in hearing and determining this action and in entering judgment therein, and the said judgment is void for the reason that the jurisdiction of the said circuit court of the United States for the ninth judicial circuit, district of Idaho, nowhere appears in the petition for transfer or removal filed in this action by the defendants, The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, undertaking to remove this action from the district court of the first judicial district of the State of Idaho in and for the county of Shoshone to the said United States circuit court for the ninth judicial circuit, district of Idaho, and such jurisdiction nowhere appears in the record in this action, and the said United States circuit court for the ninth judicial circuit, district of Idaho, is and was and at all times has been without jurisdiction to hear and determine this action or enter judgment therein.

Twelfth. The circuit court of appeals erred in sustaining and affirming the action of the said United States circuit court for the ninth judicial district of Idaho in hearing and determining and entering up judgment in this action and has no jurisdiction to hear and determine the same and enter up judgment therein for the reason that at the time of the commencement of this action the said United States circuit court for the ninth judicial circuit, district of Idaho, would not have had jurisdiction of the same under the laws of the United States had such court existed at the time of the commencement of such action for the following reasons, to wit:

102 First. At the time of the commencement of this action the Washington & Idaho Railroad Company, as is shown by the record in this action and by the petition for removal, was a corporation organized and existing under the laws of Washington Territory and was a resident and citizen of the said Territory and was not a resident or citizen of any State of the United States and was not a resident or citizen of the then Territory, now State, of Idaho, and the said Cœur d'Alene Railway & Navigation Company, one of the defendants herein, as appears by the petition for removal and the record in this action, was at the time of the commencement of this action a resident and citizen of the then Territory of Montana, and was not a resident or citizen of the Territory, now State, of Idaho or an inhabitant thereof.

Thirteenth. The circuit court of appeals erred in sustaining and affirming the action of the said circuit court and in not holding and determining that the findings of fact made by the court and each and all of the same are insufficient to support the judgment entered by the said court in this action.

Thirteenth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court in finding so much of the thirteenth finding of fact as shows that the said line "C" mentioned in said finding was intended to be a definite line of location thereon, but that the said line "B" was so platted by mistake, and that the filing of the said plat showing the said road to run over said line

"B" was not done for the purpose of in any manner deceiving the plaintiff or any one else, but was done by a mistake as aforesaid, and that the plaintiff was not in any manner misled or prejudiced by the filing of said plat or by said mistake, for the reason that the said finding is immaterial and irrelevant and is not a finding upon any of the issues in the said action.

Fourteenth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in the first conclusion of law made and filed herein by said circuit court for the following reasons, to wit:

First. For the reason that the said conclusion of law does not correctly state the law applicable to the facts found by the court in this action and is contrary to law.

Second. That the said conclusion of law is not authorized by the facts found.

Fifteenth. The circuit court of appeals erred in sustaining and affirming the action of the said circuit court in finding and determining that the said circuit court erred in its second conclusion of law made and filed herein, in so far as it concludes that at the time of the construction of the railway of the defendant over the land in controversy the same were unsurveyed public lands of the United States and were subject to the appropriation by the defendant The Cœur d'Alene Railway & Navigation Company as and for its right of way under the act of March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," for the following reasons, to wit:

First. The said conclusion does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. The said conclusion is not authorized by the facts found by the court, but is inconsistent therewith.

Sixteenth. The circuit court of appeals erred in sustaining and affirming the action of the said circuit court and in not finding and determining that the said circuit court erred in the second conclusion of law made and filed herein by the court, in so far as the court there concludes that the defendant The Cœur d'Alene Railway & Navigation Company had ever complied with the said act of Congress of March 3rd, 1875, mentioned in the said conclusion of law, for the following reasons, to wit:

First. There were no facts found by the court authorizing such conclusion of law.

Second. The said conclusion of law is inconsistent with the facts found by the court.

Seventeenth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in the second conclusion of law made and filed herein by the court, in so far as by such second conclusion of law the court holds that by reason of the compliance by the defendant The Cœur d'Alene Railway & Navigation Company with the said act of Congress or the construction

of its railroad thereon it became the owner of the premises in controversy therein and the whole thereof as a right of way under the said act of Congress, for the following reasons, to wit:

105 First. That the said conclusion of law is not authorized by the facts found by the court.

Second. The said conclusion of law does not correctly state the law applicable to the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court; and—

Fourth. For the reason that it affirmatively appears by the finding of fact made by the court that the said defendant, The Cœur d'Alene Railway & Navigation Company, did not comply with the said act of Congress and did not and could not become the owner of any of the premises in controversy herein.

Eighteenth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in its second conclusion of law made and filed herein by the court for the following reasons, to wit:

First. The said conclusion of law does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Such conclusion of law is not authorized by the facts found by the court.

Nineteenth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in its fourth conclusion of law made and filed herein by the court for the following reasons, to wit:

106 First. Said conclusion of law does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. Said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized by the facts found by the court nor supported by such facts found by the court.

Fourth. The said conclusion of law does not correctly state the law for the reason that it is found by the court that the said Cœur d'Alene Railway & Navigation Company had already appropriated a right of way, shown by the line "B," mentioned in the finding of fact by the court, parallel with the said line "C," and had filed a map of the said line "B" in the United States land office at Cœur d'Alene, Idaho, which said map was duly approved by the Secretary of the Interior, as found in the thirteenth finding of fact, and the said Cœur d'Alene Railway & Navigation Company had no right, power, or authority under the said act of Congress to appropriate or use any other right of way than the said line "B" shown upon the said map so filed and approved, and which, as shown by the findings of the court, did not cover or include any part of the premises in controversy.

Twentieth. The circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in its fifth conclusion of law made and filed herein by the court for the following reasons, to wit:

First. The said conclusion of law does not state the law
107 applicable to the facts found by the court and is contrary to law.

Second. Such conclusion of law is inconsistent with the facts found by the court.

Third. Said conclusion of law is not authorized by the facts found by the court.

Twenty-first. The said circuit court of appeals erred in sustaining and affirming the action of said circuit court and in not finding and determining that the said circuit court erred in its sixth conclusion of law made and filed herein by the court for the following reasons, to wit:

First. Said conclusion of law does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. Said conclusion of law is not supported by the facts found by the court.

Third. The said conclusion of law is inconsistent with the facts found by the court.

Twenty-second. The said circuit court of appeals erred in sustaining and affirming the action of the circuit court and in not finding and determining that the circuit court erred in the seventh conclusion of law made and filed herein by the court for the following reasons, to wit:

First. The said conclusion of law does not correctly state the law applicable to the facts found by the court and is contrary to law.

Second. That the said conclusion of law is inconsistent with the facts found by the court.

Third. The said conclusion of law is not authorized or supported by the facts found by the court.

108 Wherefore the said Washington & Idaho Railroad Company, plaintiff in error and the plaintiff in this action, prays that the judgment rendered in this cause may be reversed, set aside, and held for naught.

W. W. COTTON,
Attorney for the Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed February 11th, 1895. F. D. Monckton, clerk.

109 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff in Error,
vs.
CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants in Error.

Know all men by these presents that the Washington & Idaho Railroad Company, a corporation, as principal, and C. M. Brune and J. H. Maguire, as sureties, *and* held and firmly bound unto the Cœur d'Alene Railway & Navigation Company in the sum of one thousand dollars, to be paid to the said Cœur d'Alene Railway & Navigation Company or its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns and our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16 day of January, 1895.

Whereas the above-named Washington & Idaho Railroad Company, plaintiff in error, has caused a writ of error to be sued out from the Supreme Court of the United States to the United States circuit court of appeals for the ninth judicial circuit to reverse the judgment in the above-entitled cause rendered by the United States circuit court of appeals for the ninth judicial circuit affirming the judgment of the circuit court of the United States for the ninth circuit, district of Idaho, in the above-entitled cause:

110 Now, therefore, the condition of this obligation is such that if the above-named Washington & Idaho Railroad Company shall prosecute said writ of error to effect and answer all costs if it shall fail to make good the said writ of error, then this obligation shall be void; otherwise to remain in full force and virtue.

THE WASHINGTON & IDAHO RAILROAD COMPANY, [SEAL.]
By W. W. COTTON, *Its Attorney.*
C. M. BRUNE. [SEAL.]
J. H. MAGUIRE. [SEAL.]

Witness:
G. C. TEAL.

UNITED STATES OF AMERICA, *District of Idaho,* } *ss:*

I, C. M. Brune, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities exclusive of property exempt from execution.

C. M. BRUNE.

Subscribed and sworn to before me this 16th day of Jan'y, 1895.
[SEAL.] H. K. MOORE,
Notary Public in and for Idaho.

111 UNITED STATES OF AMERICA, } ss:
District of Idaho, }

I, J. H. Maguire, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. H. MAGUIRE.

Subscribed and sworn to before me this 16th day of Jan'y, 1895.
[SEAL.] H. K. MOORE,
Notary Public in and for Idaho.

In my opinion the within-named J. H. Maguire and M. C. Brune, the sureties in the within bond, are worth the sum of one thousand dollars (the amount named in the bond) over and above all their debts and liabilities, and I certify that they are good for the amount named.

Boisé City, Idaho, January 22, 1895.

JAS. H. BEATTY,
U. S. Dist. Judge for Idaho.

Approved:

JOHN M. HARLAN,
Associate Justice Supreme Court U. S.

(Endorsed:) Bond on writ of error. Filed February 11th, 1895. F. D. Monckton, clerk.

112 United States Circuit Court of Appeals for the Ninth Circuit.

THE WASHINGTON & IDAHO RAILROAD COMPANY, Plaintiff in Error,
vs.
CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY and The Northern Pacific Railroad Company, Defendants in Error. } No. 113.

I, Frank D. Monckton, clerk United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and eleven pages, numbered from 1 to 111, inclusive, to be a full, true, and correct copy of the printed record and of all proceedings in the above-entitled cause in our said circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 12th day of March, A. D. 1895.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Washington & Idaho Railroad Company, plaintiff in error, and The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, The Washington and Idaho Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

114 [Endorsed:] No. 113. Washington & Idaho R. R. Co., pl'ff in error, *v.* Cœur d'Alene R'y & Nav. Co. *et al.* Writ of error. Filed February 11, 1895. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

The Answer of the Judges of the United States Circuit Court of of *Appeals for the Ninth Circuit.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under

the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

115 UNITED STATES OF AMERICA, *ss:*

To the Cœur d'Alene Railway and Navigation Company and the Northern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Washington and Idaho Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this fourth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

116 [Endorsed:] No. 113. Washington & Idaho R. R. Co., pl'ff in error, *v.* Cœur d'Alene R'y & Nav. Co. & N. P. R. R. Co. Citation. Filed February 19, 1895. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

I hereby accept service of the within by copy this Feb. 16, 1895, at Spokane, Washington.

JNO. R. McBRIDE,
Att'y for Def't in Error.

Endorsed on cover: Case No. 15,859. U. S. circuit court of appeals, ninth circuit. Term No., 585. The Washington and Idaho Railroad Company, plaintiff in error, *vs.* The Cœur d'Alene Railway & Navigation Company and The Northern Pacific Railroad Company. Filed April 5th, 1895.

FILED.
OCT 28 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 585.

The Washington and Idaho Railroad Co.,
Plaintiff in Error,

vs.

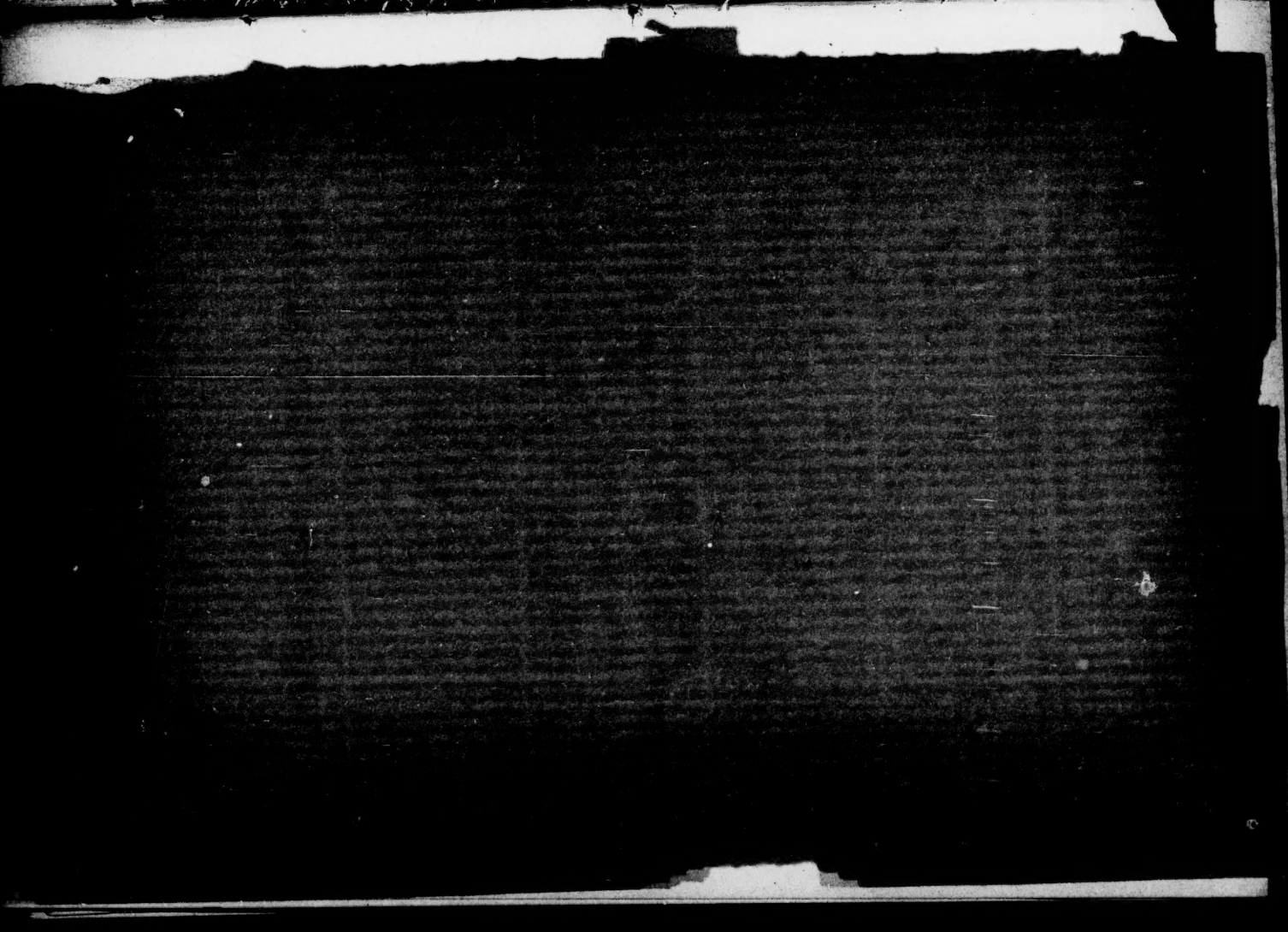
The Cœur D'Alene Railway and Navigation Co. and the Northern Pacific Railroad Co.,
Defendants in Error.

In Error to the Circuit Court of Appeals of the United States for the Ninth Circuit.

BRIEF FOR PLAINTIFF IN ERROR

By W. W. Cotton,
Samuel Shellabarger,
Jeremiah M. Wilson, and
A. A. Hoehling.

McGill & Wallace, Law Printers, Washington, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff in Error,

vs.

THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY AND THE NORTHERN PACIFIC RAILROAD COMPANY, Defendants in Error.

No. 585

In Error to the Circuit Court of Appeals of the United States for the Ninth Circuit.

In the case of the Washington and Idaho Railroad Company, appellant, *v.* the Cœur d'Alene Railway and Navigation Company, No. 4 on the presen docket of this court, there will be found, in the brief for appellant, a statement of all the material facts involved in the above-entitled ejectment case, No. 585, and it is, therefore, not proper to encumber this brief with a repetition of those facts. The facts in both of these cases, Nos. 4 and 585, are substantially the same. Wherein they differ materially (if there be any difference), that difference will be hereafter brought to the attention of the court.

The present ejectment suit was commenced on the 15th of May, 1889, in the District Court for the First Judicial District of the then Territory of Idaho, by the plaintiff

in error, the Washington and Idaho Railroad Company, against the defendants in error, the Cœur d'Alene Railway and Navigation Company and the Northern Pacific Railroad Company, for the recovery of a strip of land, described in the complaint, "being the right of way of the plaintiff's railroad, consisting of a strip of land two hundred feet in width, or one hundred feet on each side of the described central line of the railroad of the plaintiff," at a certain point on said road at and near the town of Wallace, Idaho, which is fully described in the Record, at page 3, folio 4 thereof.

The petition of the Washington and Idaho Railroad makes the Cœur d'Alene and the Northern Pacific Companies defendants, the Northern Pacific Company being made a defendant, however, only because it was alleged to claim possession of the premises in controversy as tenant of the Cœur D'Alene Company. The Northern Pacific Company never was served with process, never appeared or made any defense in the action, and never did anything except to unite in a petition for the removal of the case from the Territorial court to the Circuit Court of the United States (*R., p. 14*). At page 22, folio 40, of the Record, this fact is stated in the judgment of the court, to which judgment the Northern Pacific Company is not a party.

The Cœur d'Alene Company filed its own separate answer for itself alone (*R., p. 5*) in the said District Court for Shoshone County on the 7th of April, 1891 (*R., p. 8*), in which is contained a general denial of the averments of the petition, and a cross-bill or counter-claim setting up the construction of its own road, and facts alleged to constitute an estoppel against the claim of the plaintiff. On page 8 of the Record are certain stipulations as to the admission in evidence in the case at bar of the files and evidence adduced in said equity case, above referred to, which is No. 4 on the present docket of this court. On

page 14 of the Record will be found an agreement to waive a jury and to submit the case to the court. The findings of fact by the trial court are set forth on pages 13 to 22, inclusive.

Assignment of Errors.

We here adopt as part of this brief the assignment of errors made by the plaintiff in error in the court below as found in the Record at pages 4 to 16, inclusive. The length of this assignment, and the fact that it is as easily accessible to the court in the Record as it would be in this brief, induce us to omit the setting forth of said assignment herein.

BRIEF.

There are one or two points that ought to be stated here, and which were not specifically or very fully made in the court below.

1. One of them is that the fact that the Northern Pacific Company united with the Cœur d'Alene Company in making the motion for the removal of the case to the Circuit Court of the United States did not make the Northern Pacific Company a party in the case.

This will be found decided in the case of *Parrott* v. *Alabama Gold Life Insurance Co.* (5 Fed. Rep., 391), opinion by McCormick, C. J. The same thing will be found decided in the following cases:

Atchison v. *Morris*, 11 Fed. Rep., 582, opinion by Drummond, C. J.;

Small v. *Montgomery*, 17 *id.*, 685, opinion by Treat, J.;

Miner v. *Markham*, 28 *id.*, 387, opinion by Dyer, J.;

Perkins v. *Hendrix*, 40 *id.*, 657;

Golder v. *Morning News Co.*, 42 *id.*, opinion by Lacombe, J.;
Clews v. *Woodstock*, 44 *id.*, 31, opinion by Lacombe, J.;
Reifsnider v. *Publishing Co.*, 45 *id.*, 433, opinion by Thayer, J.;
Bentliff v. *Finance Corporation*, 44 *id.*, opinion by Wallace, J.;
Tallman v. *B. and O. R. R.*, 45 *id.*, 156, opinion by Sage, J.

In the light of these authorities it can not be fairly affirmed that the Northern Pacific Company was ever a party to this suit in the court below, and, for this reason, the court below did not acquire jurisdiction on the ground that a Federal corporation was either a proper or necessary party, or a party at all.

2. It can not be accurately maintained that the fact of our demanding that this court shall reverse the judgment below, because the court below had no jurisdiction, results in depriving this court of the power and jurisdiction to reverse the said judgment below.

In the case of *United States* v. *Huckabee* (16 Wall., 435), this court holds what is thus stated in the opinion by Justice Clifford:

"Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction, and has given judgment or decree for the plaintiff, or improperly declared affirmative relief to the complainant. In such a case the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy."

This ruling has been repeatedly reaffirmed by this court, generally in the same language here used by Justice Clifford, and is, therefore, the settled law of this court upon said point.

See *Insurance Co.* v. *Globe Insurance Co.*, 98 U. S., 379;
Railroad v. *Swan*, 111 U. S., 384.

I.

The United States Circuit Court for the District of Idaho had no jurisdiction to enter up judgment herein against the plaintiff in error and in favor of the defendant in error.

This action was, as already stated, commenced in the District Court for the Territory of Idaho on the 15th day of May, 1889. On August 27, 1890, after the admission of Idaho into the Union as a State, the action was undertaken to be transferred into the Circuit Court of the United States for the District of Idaho under the provisions of the act providing for the admission of Idaho into the Union, approved July 3, 1890.

26 Statutes at Large, p. 215.

The section of the act relating to the jurisdiction of the Federal courts created by the act is as follows:

"§ 18. That in respect to all cases, proceedings, and matters now pending in the Supreme or District Courts of the said Territory at the time of the admission into the Union of the State of Idaho, and arising within the limits of such State, *whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said Territory;* and in respect

to all other cases, proceedings, and matters pending in the Supreme or District Courts of said Territory at the time of the admission of such Territory into the Union, arising within the limit of said State, the courts established by such State shall, respectively, be the successors of said Supreme and District Territorial courts, and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such Circuit, District, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the State shall be pending in any Territorial court in said Territory shall abate by the admission of such State into the Union, but the same shall be transferred and proceeded with in the proper United States, Circuit, District, or State court, as the case may be: *Provided, however,* That in all civil actions, causes, and proceedings in which the United States is not a party transfers shall not be made to the Circuit and District Courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts."

Under the language of this act, the Federal courts created by the act became the successors of the Territorial courts only in regard to the class of cases of which the Federal courts might have had jurisdiction had such courts been in existence at the time of the commencement of the action.

Johnson *v.* Bunker Hill Mining Co., 46 Fed. Rep., 417;

Back *v.* Sierra Nevada Mining Co., 46 Fed. Rep., 673;

Strasberger *v.* Beecher, 44 Fed. Rep., 209.

Two things are necessary to give a court of the United States jurisdiction over any particular action: *First,* the action itself must be within the jurisdiction of the court;

and *second*, the jurisdictional facts must affirmatively appear in the record. It is not enough for the court to see from the evidence, or know as a matter of fact, that it has jurisdiction; but such jurisdiction must actually appear by suitable allegations in the pleadings or in the petition for removal, and unless such jurisdiction affirmatively appears, then it is the duty of the court to dismiss the action, although such jurisdiction may actually exist.

Insurance Co. *v.* Pechner, 95 U. S., 185;
Robertson *v.* Cease, 97 U. S., 647;
Swan *v.* Railway Co., 111 U. S., 255;
Parker *v.* Ormsby, 141 U. S., 81, 83;
Crehore *v.* Ohio Ry. Co., 131 U. S., 240;
Gold Washing Company *v.* Keyes, 96 U. S., 199;
Gibbs *v.* Crandall, 120 U. S., 105.

A distinction is to be observed between the effect of a failure to allege the proper jurisdictional facts in a suit originally commenced in the United States Circuit Court and the effect of a failure to properly allege jurisdictional facts in the petition for removal, whereby a case is undertaken to be transferred from a State court into the United States Circuit Court. Failure to properly allege the jurisdictional facts in a suit originally commenced in the Circuit Court may be cured by amendment. (Continental Insurance Company *v.* Rhodes, 119 U. S., 237.) But where the jurisdictional facts fail to appear at the time of the removal, in the record, of a cause undertaken to be transferred from a State court into the United States Circuit Court, then such defect is fatal to the jurisdiction and can not be corrected by amendment.

Crehore *v.* Ohio, etc., Railway Co., 131 U. S., 240.

The necessary jurisdictional facts must affirmatively appear in the record at the time of removal, or else there is no possible way in which the court can acquire

jurisdiction, no matter what the actual jurisdictional facts may be. The petition for removal, or request of transfer, is the proceeding whereby the State court is ousted of its jurisdiction, and jurisdiction is conferred upon the United States court. Any irregularity in the proceeding for transfer or removal leaves the action still pending in the State court, and leaves the United States court without any jurisdiction to take any action therein. It appears, therefore, that in a case brought into the United States Circuit Court by transfer or removal, the jurisdictional facts must not only exist, but must be shown, and can be shown in no other way, and at no other time, except by the record as it existed at the time of the removal or transfer.

The effect of section 18 of the Idaho Enabling Act was to confer jurisdiction on the State courts of all civil actions in which the United States was not a party, unless a proper written request showing the jurisdiction of the United States court was filed in the proper court, as required by the act. On familiar principles, such request for transfer, in order to oust the State court of jurisdiction and confer jurisdiction upon the United States court, must necessarily show that the United States court might have had jurisdiction of the action had such courts existed at the time of the commencement of such cases, as well as jurisdiction at the time when the action was undertaken to be transferred.

Johnson *v.* Bunker Hill Mining Co., 46 Fed. Rep., 417;

Bank *v.* Sierra Nevada Mining Co., 46 Fed. Rep., 673;

Strasberger *v.* Beecher, 44 Fed. Rep., 209.

Such request can not be amended in the United States court; and a failure to properly allege therein the neces-

sary jurisdictional facts is fatal to the jurisdiction of this court and of the court below.

Crehore *v.* Ohio, etc., Ry. Co., 131 U. S., 240;
Stevens *v.* Nichols, 130 U. S., 230;
Gold Washing Co. *v.* Keyes, 96 U. S., 201.

The request for the transfer of the action (Record, fol. 19 to 21) states the following grounds of jurisdiction:

"And further alleging herein, your petitioners show:

"*First.* That your petitioner, the Northern Pacific Railroad Company, is a corporation created and organized, and existing under and by virtue of an act of Congress of the United States, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by a northern route.' Approved July 2, 1864.

"*Second.* That your petitioner, the Cœur d'Alene Railway and Navigation Company, is a railway corporation, created and organized and existing under and by virtue of the laws of the State of Montana, and has been organized as such corporation since the 5th day of July, 1886, and doing business in the Territory, now State of Idaho, with its principal place of business at Helena, State of Montana.

"*Third.* That the plaintiff herein, the Washington and Idaho Railroad Company, is a corporation, organized and existing under and by virtue of the laws of the Territory, now State of Washington, and has been such corporation from and prior to the commencement of this action.

"*Fourth.* That this action was commenced in the District Court of the First Judicial District of the Territory of Idaho, in and for the county of Shoshone, and was there pending on the 3d day of July, 1890, when the said Territory of Idaho became a State under the authority granted by the act of Congress, entitled 'An act to provide for the admission of the State of Idaho into the Union.' Approved July 3, 1890.

"*Fifth.* That your petitioner, the Northern Pacific Railroad Company, is not a citizen or resident of the State of Idaho, nor has it been such a citizen or resident at any time since the commencement of this action. That the said Cœur d'Alene Railway and Navigation Company is not a citizen of the State of Idaho, nor has it been such at any time since the commencement of this action. That the said Washington and Idaho Railroad Company, the plaintiff herein, is now and ever has been, since the commencement of this action, a citizen of and a resident of the now State of Washington.

"*Sixth.* That this action brings before the court a controversy arising between citizens of different States and corporations organized under the laws of different States.

"*Seventh.* That this is a suit of a civil nature arising under the laws of the United States, and that the same is now pending in the State court and is properly within the jurisdiction of the Circuit Court of the United States for the Ninth Judicial Circuit, District of Idaho, and that said action is brought in ejectment to oust and eject the defendants from the grounds known as the Wallace depot grounds, as described in the complaint herein to which reference is made, and for damages for the detention of the said ground.

"*Eighth.* That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."

The two grounds of jurisdiction suggested by this petition, namely, diverse citizenship and the corporate character of the Northern Pacific Railroad Company, are the only grounds of jurisdiction anywhere hinted at throughout the entire Record.

Upon these grounds alone was the State court sought to be deprived of the jurisdiction conferred upon it over this action by the enabling act. Unless the jurisdictional facts above mentioned actually existed and are sufficiently stated, then no transfer took place, and the court below is without jurisdiction. The grounds of

jurisdiction do not and did not, as a matter of fact, exist; and did not and do not sufficiently appear in the Record to give this court or the court below jurisdiction of this present action.

1. The court below had no jurisdiction by reason of the Federal character of the Northern Pacific Railroad Company.

Under the Enabling Act of Idaho the action undertaken to be transferred to the Federal court must be an action "pending" at the time the transfer is undertaken to be made.

Glasspell *v.* Northern Pacific Railroad Co., 144 U. S., 211.

While the name of the Northern Pacific Railroad Company appears in the papers in this action, yet, nevertheless, this action was not pending against the Northern Pacific Railroad Company at the time of the admission of Idaho into the Union as a State, and the court below *so expressly found.*

The judgment in this action is a judgment in favor of the Cœur d'Alene Railway and Navigation Company and against the Washington and Idaho Railroad Company, and the Northern Pacific Railroad Company is not a party to the judgment. It is recited in the judgment (Record, p. 22), as well as in the finding of facts made by the court, that the defendant, the Northern Pacific Railroad Company, *never was served and never appeared in the action.* This recital in the judgment, and the finding of facts upon which it is based, are not appealed from by either of the parties to the judgment and action, and necessarily are binding upon both.

The Federal charter of a corporation can only give rise to a Federal question when the corporation is an actua

party to the suit, actively present, and actively engaged in the litigation.

Pacific Removal Cases, 115 U. S., 12;
Metcalf *v.* Watertown, 128 U. S., 589.

If the Northern Pacific Railroad Company never appeared and was never served in the action, then there was no Federal question in the case arising by reason of the fact that a company known as the Northern Pacific Railroad Company happened to be incorporated by an act of Congress. The magic of the name of the Northern Pacific Railroad Company can not be invoked to support a judgment rendered in a case in which it was not served and in which it never appeared. The judgment in this action did not, in any possible way or for a single moment, involve the consideration of the charter of the Northern Pacific Railroad Company, and no Federal question arose in the action by virtue of that charter, and the action did not arise under the Congressional act incorporating the Northern Pacific Railroad Company. It is only when an act of Congress is directly brought into consideration in an action that the cause can be said to arise under such act.

Gold Washing Company *v.* Keyes, 96 U. S., 199;
Gibbs *v.* Crandall, 120 U. S., 108;
Shreveport *v.* Coe, 129 U. S., 41, and cases cited at the bottom of p. 41.

Jurisdiction will not be entertained in an action, even where the petition for removal states a clear Federal question, if the party at the time of filing such petition enters a special appearance for the purpose of setting aside the service of summons made in the State court.

Germania Insurance Co. *v.* Wisconsin, 119 U. S., 473.

The only Federal question alleged in the petition for removal, or shown by the pleadings, was that suggested

by the incorporation of the Northern Pacific Railroad Company. When it appeared to the court below that the Northern Pacific Railroad Company never appeared and was never served in the action, then the only possible Federal question in the cause shown by the Record was entirely eliminated.

2. There can be no jurisdiction of this action on the ground of diverse citizenship.

In order to give the court below jurisdiction of this action under the Enabling Act of Idaho, the citizenship of the parties at the time of the commencement of the action must have been such as to give jurisdiction to the court below. This action was commenced on the 15th day of May, 1889. At that time both Washington and Montana were territories, Washington being admitted by the proclamation of the President on the 11th day of November, 1889, and Montana being admitted by like proclamation on the 8th day of November, 1889. The citizenship of the Washington and Idaho Railroad Company and the Cœur d'Alene Railway and Navigation Company is shown by the complaint (p. 3), and it is admitted by the answer (pp. 5 and 6) that at the time of the filing of the answer the Cœur d'Alene Railway and Navigation Company was a citizen of the Territory of Montana. Under late decisions of the Supreme Court, a corporation is a "citizen," and a "resident," and "an inhabitant" of the State or Territory which created it, and can not, by doing business in other States, become a "citizen," a "resident," or "inhabitant" of such other States or Territories.

Shaw *v.* Quincy Mining Co., 145 U. S., 444;
Southern Pacific Company *v.* Denton, 146 U. S., 225.

At the time of the commencement of this action, the Washington and Idaho Railroad Company was therefore a resident, citizen, and inhabitant of the Territory of Washington, and the Cœur d'Alene Railway and Navigation Company was a resident, citizen, and inhabitant of the Territory of Montana; and no suit either by or against either of such corporations could have been removed, transferred, or commenced in a Federal court on the ground of diverse citizenship.

New Orleans *v.* Winter, 1 Wheaton, 91;
Railway Company *v.* Swan, 111 U. S., 381;
Johnson *v.* Bunker Hill, etc., & Co., 46 Fed. Rep., 417;
Back *v.* Mining Co., 46 Fed. Rep., 673;
Strasberger *v.* Beecher, 44 Fed. Rep., 209.

3. The Record in this action nowhere shows jurisdiction in the Circuit Court for the District of Idaho.

Jurisdiction must affirmatively appear in the record.

Parker *v.* Ormsby, 141 U. S., 81, 83;
Gold Washing Co. *v.* Keyes, 96 U. S., 199.

Such jurisdiction must not only affirmatively appear to exist at the time of the admission of Idaho into the Union, as a State, but also must be shown affirmatively to have existed at the time the action was commenced. This is plainly required by the language of the act.

Strasberger *v.* Beecher, 44 Fed. Rep., 209;
Back *v.* Mining Co., 46 Fed. Rep., 613.

The petition for removal nowhere states the existence of any jurisdictional fact as of the date when the action was commenced; but the allegations of the petition are all confined to the date on which the petition itself was

filed. Such a petition does not state facts sufficient to confer jurisdiction upon the court.

Strasberger *v.* Beecher, 44 Fed. Rep , 209;
Back *v.* Mining Co., 46 Fed. Rep., 673;
Stevenson *v.* Nichols, 130 U. S., 230.

No Federal question is alleged with sufficient accuracy in the petition or elsewhere in the Record to have authorized the court below to have entertained jurisdiction of this action.

Gold Washing Company *v.* Keys, 96 U. S., 201;
Gibbs *v.* Crandall, 120 U. S., 105, 109;
Theurkauf *v.* Ireland, 27 Fed. Rep., 769;
Austin *v.* Gagan, 39 Fed. Rep., 626.

In Gold Washing Co. *v.* Keys, *supra*, the court says:

"For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the court must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction. If it fails in this it is defective in substance, and must be treated accordingly. Thus, in Insurance Company *v.* Pechner (95 U. S., 183), we decided that a petition for removal, on account of the citizenship of the parties, did not divest the State court of its power to proceed; because, when taken in connection with the pleadings and process in the cause, it failed to show such citizenship at the time of the commencement of the action as would give the Circuit Court jurisdiction. And in Armory *v.* Armory (*id.*, 186), we held to the same effect in reference to a petition which failed to set forth the personal citizenship of the parties.

"The office of pleading is to state the facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.

"In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of, and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes.

"Certainly an answer or plea containing only the statements of the petition would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough, for that is the precise question the court is called upon to determine."

In conclusion, we can make no better argument against the jurisdiction of the court in the present case than that contained in the opinion of the Supreme Court of the United States in Crehore *v.* Ohio Railway Company (131 U. S., 240.) It is there clearly stated that the mere filing of a petition for the removal of a suit which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed and the petition must show a right in the petitioner to demand the removal. Mr. Justice Harlan, in delivering the opinion of the court (p. 244), says:

"It thus appears that a case is not, in law, removed from the State court, upon the ground that it involves a

controversy between citizens of different States, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the State court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further,' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' (Stone *v.* South Carolina, 117 U. S., 430, 432; Carson *v.* Hyatt, 118 U. S., 279, 287.) If the case be not removed, the jurisdiction of the State court remains unaffected, and, under the act of Congress, the jurisdiction of the Federal court could not attach until it becomes the duty of the State court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal."

II.

The plaintiff's rights in the premises are prior to those of the defendant, and judgment should have been rendered in favor of the plaintiff.

The Washington and Idaho Railroad Company and the Cœur d'Alene Railway and Navigation Company during the years of 1886, 1887, and 1888 were engaged in constructing railroad lines in the northern part of Idaho, into and through the town of Wallace. The present suit is a controversy arising between the two parties as to their respective rights in a piece of ground near Wallace, at the present time occupied by the railroads of both parties, each company, however, claiming one hundred (100) feet on each side of the center line of its road. The Washington and Idaho Railroad Company claimed the prior right, and in order to protect its right commenced an injunction suit against the Cœur d'Alene Railway and Navigation Company, and one

George P. James, its engineer. This suit was commenced in the District Court in and for Shoshone County, Idaho, in the year 1887. The case finally went to the Supreme Court of the Territory, and is reported in 21 Pacific Reporter, at page 562. Relief was refused on the ground that the defendant was now in the possession of the premises, and that, therefore, the plaintiff had an adequate remedy at law by a suit in ejectment.

An appeal was taken in the equity suit from the Supreme Court of the Territory to the Supreme Court of the United States, where the case is now pending. Immediately upon the reversal of the judgment in the equity suit the plaintiff, the Washington and Idaho Railroad Company, commenced the present action in ejectment against the Cœur d'Alene Railway and Navigation Company and the Northern Pacific Railroad Company. This action was tried before Judge Beatty without a jury, and the court rendered judgment in favor of the defendant. Unfortunately for the plaintiff, no bill of exceptions was taken upon the trial, and many of the facts in the case do not appear in the findings made. The court will note, from the dissenting opinion of Judge Berry in the equity suit (21 Pac. Rep., p. 562), that the plaintiff made and filed a map of its route across the premises in controversy, and that such map was certified and approved by the Secretary of the Interior, February 11, 1877, long prior to any occupancy of the premises by the defendant. This fact does not appear in the findings.

There are two questions to be considered in this case: *First*, whether the rights of the plaintiff are superior to those of the defendant; and, *second*, whether the plaintiff has such a title or right in the premises as will enable it to maintain ejectment.

Under the findings of fact, the defendant has no right to the premises in controversy, or any part thereof.

The only right claimed by the defendant in the premises is a right acquired under and by virtue of the general right of way act of Congress of March 3, 1875. (Supplement to the Revised Statutes, p. 91.) By the fourth finding, it is stated that the defendant, in 1886, staked three lines through the town of Wallace, called lines "A," "B," and "C," lines "A" and "B" being on the south side of the Cœur d'Alene River, and line "C" being on the north side of the Cœur d'Alene River, and being lines across the premises in controversy. This survey was made across the premises in controversy, according to the tenth finding, on the 29th day of October, 1886.

On the 9th day of November, 1886, ten days after the completion of the survey of the three lines, "A," "B," "C," the defendant filed in the United States land office at Cœur d'Alene, Idaho, the map or profile, which was approved by the Secretary of the Interior December 3, 1886, the said line "B" through the said town of Wallace being platted as the line of route of the said road. (13th finding.) In the fall of 1887 (fifth finding) the defendant sought to construct its railroad upon line "C," and across the premises in controversy. No amendment of the defendant's route was made, and no approval of the Secretary of the Interior was obtained to any new map covering the new line "C." The plaintiff maintains that the effect of the filing and approval of the map line "B" by the Secretary of the Interior was to vest in the defendant a right of way one hundred (100) feet wide on each side of the center line of its road, as indicated upon said map, which right could not be changed without the consent of the granting power first had and obtained.

It is a familiar principle, applicable to railroad companies incorporated under general incorporation laws, that when they have once selected their route the right to exercise a choice as to the route of the railroad is exhausted.

Lewis on Eminent Domain, section 258.

The same principle is directly applicable to the general right of way act of Congress. While the grant made is indefinite and uncertain, and the company possesses the power to select its own route; yet, nevertheless, but one right of way is granted, and not several, and when rights under the general right of way act have become acquired and vested, the power of the company to take under the act immediately ceases. When the right of way becomes vested, the company has received the benefits of the act to the same extent as if the right of way had been particularly described in the act itself. The benefits of the act, according to the fourth section, are secured by the filing of a map with the proper officers of the Land Department and the approval of such map by the Secretary of the Interior. When such map is filed and such approval is received, the rights become vested and fixed, subject only to be divested in case the road is not built within five years after its location. For the purpose of carrying out the general right of way act, the Secretary of the Interior has adopted certain rules and regulations. The rules and regulations of the Department of of the Interior, issued November 7, 1879, and in force during the period of this controversy, are as follows:

"I. Any railroad company desiring to obtain the benefits of the law is required to file—

"*First.* A copy of its articles of incorporation, duly certified to by the proper officers of the company, under its corporate seal.

"*Second.* A copy of the State or Territorial law under which the company was organized (when organized under

State or Territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law.

"*Third.* When said law directs that the articles of association, or other papers connected with the organization, be filed with any State or Territorial officer, the certificate of such officer that the same has been filed according to law, with the date of the filing thereof.

"No forms are prescribed for the above portion of the 'due proofs' required, as each case must be governed, to some extent, by the laws of the State or Territory.

"Under the following regulations proper forms will be found herein.

"*Fourth.* The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road, according to the existing law of the State or Territory; and that the copy of the articles filed with the Secretary of the Interior is true and correct.

"*Fifth.* A true list, duly verified by the sworn statement of the president, under the seal of the company, showing the names and designation of its respective officers at the date of the presentation of the proofs at the Department.

"These may be transmitted directly to the Secretary of the Interior, or through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office.

"II. Upon the location of any section of the line of route of its road, not exceeding twenty miles in length, the company must file with the register of the land district in which such sections of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys.

"The map must be filed within twelve months after the location of such portion of the road, if located upon

surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof. It must bear—

"*First.* Affidavit of the chief engineer of the company (or person employed to make the survey, if the company has no chief engineer), setting forth that the survey of route of company's road from —— to ——, a distance of —— miles (giving the termini and distance), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed for the purpose, if such be the case), under authority of the company, on or between certain dates (giving the same), and that such survey is accurately represented on the map. If the affidavit is made by the chief engineer of the company it must be signed by him officially.

"*Second.* Official certificate of the president of the company, attested by its secretary, under its corporate seal, regarding the person signing the affidavit, either as to his being the chief engineer of the company or as to his employment by the company for the purpose of making such survey; that the survey was made under the authority of the company; that the line of route so surveyed and represented by the map was adopted by the company, by resolution of its board of directors of a certain date (giving date), as the definite location of the line of route of the company's road from —— to ——, a distance of —— miles (giving termini and distance), and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States.'

"III. It will be observed that the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is, therefore, imperative that proper steps, as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained

prior to the construction of any part of its road or its occupancy of the public lands in any manner.

"IV. Should the company desire to construct its road over lands prior to their survey it may file, in manner as heretofore indicated, a map of its surveyed route, without waiting until the lands are surveyed, and upon approval thereof, may proceed with construction, but, immediately on the survey of the lands over which the road passes, the company must also file a map showing the line of route of its road over such lands, in order that the proper notes and records for the protection of its rights may be made.

"V. Upon construction of any section of the line of its road the company must file with the register of the proper land district, for transmission to this office, a map of such constructed portion of road, bearing—

"*First.* Affidavit of the chief engineer or person under whose supervision the portion of the road was constructed; that its construction was commenced on——— and finished on ————(giving dates); that the line of constructed road is accurately represented upon the map, and that it conforms to the line of located route which received the approval of the Secretary of the Interior on————(giving date).

"*Second.* Certificate of the president of the company, attested by the secretary under the corporate seal, that the portion of the road indicated by the map was actually constructed at the time as sworn to by the chief engineer of the company (or person making the affidavit), and on the exact route shown on the map; that in its construction the road does not deviate from the line of route approved by the Secretary of the Interior, and that the company has in all respects complied with the requirements of the act of March 3, 1875, granting right of way through the public lands.

"Any variation within the limits of one hundred feet from the central line of the road as located will not be considered as a deviation from such line, but where, upon construction, it is found necessary to transgress the limits in which the company has right of way, the

company must at once file proper map of amended route for approval."

"VI. If the company desires to avail itself of the provisions of the law which grant the use of 'ground adjacent to the right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road,' it must file for approval, in each separate instance a plat, showing, in connection with the public surveys, the surveyed limits and area of the ground desired. Such plat must bear—

"*First.* Affidavit of the chief engineer or surveyor by whom or under whose supervision the survey was made, to the effect that the plat accurately represents the surveyed limits and area of the grounds required by the company for station or other purposes, under the law (stating the purposes) in ———, (giving section, township, range, and State or Territory); that the company has occupied no other grounds for station or other similar purposes upon public lands within ten miles of the ground designated on the plat, and that, in his belief, the grounds so represented are actually, and to their entire extent, required by the company for the necessary uses contemplated by law.

"*Second.* Certificate of the president of the company, attested by the secretary under the corporate seal, that the survey of the tract represented by the plat was made under the authority and by direction of the company by or under supervision of its chief engineer (or person making the survey), whose affidavit is attached; that said survey accurately represents the grounds actually and to their entire extent required by the company for station (or other) purposes in ———, (giving section, township, range, State or Territory), allowed by the provisions of the act of Congress approved March 3, 1875, granting to railroads the right of way through the public lands; that the company has no station or other grounds upon public lands within a distance of ten miles from the ground represented on the plat; and that the company by resolution of its board of di-

rectors of a certain date (giving the date) directed the proper officers to present the plat for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds under the law referred to.

"VII. Registers at the various land offices are directed to require that such papers and maps herein referred to as may be filed with them for transmission to this office shall conform to these regulations. Where differences of opinion may arise between themselves and the persons filing papers respecting the proper construction of these requirements, the papers may be transmitted with letter stating the different opinions.

"They are also instructed, in any case where information is received by them of the construction of railroads within their districts, of the rights of which they have no official knowledge, to promptly advise this office of the facts in order that proper information or directions in the matter may be given them.

"VIII. Action upon maps filed will be facilitated by presenting them in duplicate. The attention of companies seeking the benefits of this act should be especially directed to this suggestion, as serious delays and embarrassments are often incurred, through the inability of this office, owing to its limited clerical force to prepare the necessary copies for transmission to the district offices.

"Very respectfully,

"J. W. ARMSTRONG,
"*Acting Commissioner.*

"DEPARTMENT OF THE INTERIOR,

"*November 7, 1879.*

"Approved.

"C. SCHURZ, *Sec'y.*"

Rules and regulations of the character adopted by the Secretary of the Interior, in connection with the general right of way act, have the force of law.

Ex parte Reed, 100 U. S., p. 13.

The map filed by the defendant, as shown by the thirteenth finding, was filed and approved in accordance with the fourth paragraph of the regulations above quoted, explaining and regulating the practice required by section four of the general right of way act. While the defendant may not have been required, under the act, to file its map at the time such filing was made, yet it had a right to do so under paragraph four of the regulations of the Secretary of the Interior; and when such map was approved by the Secretary of the Interior, the defendant thereupon "secured" the benefits of this act as provided by section four of the act. The benefit which the company secured was a right of way one hundred (100) feet in width on each side of the center line of its road, as indicated upon the said map.

This right of way was all that Congress, by the general right of way act, conferred, or undertook to confer, upon the defendant in respect of its line of road through Wallace. The defendant, therefore, on the ninth day of November, 1886, and December 3, 1886, actually took the necessary steps to secure the right of way granted by the act on line "B," and its intention to so secure such right of way was registered by appropriate acts in the General Land Office of the United States. By the filing of this map upon Line "B," the defendant actually secured the benefits of the act, and the right of the defendant to the right of way, one hundred feet wide, on each side of the center line "B," became fixed and definite, and the defendant could not thereafter alter its route so as to affect the rights of any other party.

McKeoin *v.* Northern Pacific R. R. Co., 45 Fed. Rep., 466;

Pacific Railroad Co. *v.* Dunmeyer, 113 U. S., 634;

Sioux City, etc., Land Co. *v.* Griffith, 143 U. S., 39;

M. K. & T. Ry Co. *v.* Cook, 27 Pac. Rep., 847.

The mere fact that the defendant may have platted Line "B" by a mistake can not possibly affect its rights in the premises, because there was no mistake on the part of the Secretary of the Interior in approving the map, and by that approval the defendant's rights became vested and fixed. If the defendant desires to avoid the consequences of any mistake on its part, it must take the necessary steps to vacate the old filing and acquire a new grant, and certainly should not be allowed, by reason of its own mistakes, to prejudice the rights acquired by others. No one required the defendant to file this map. It filed such a map for its own benefit, intending thereby to acquire the benefits conferred by the act, as provided by section four, and did, as a matter of fact, actually acquire such benefits to the extent of one hundred feet on each side of the line "B," indicated upon the said map. Can the defendant file a map on Line "B" and have the same approved, and thereby, under the general right of way act, hold it against all the world for a period of five years, and yet, at the same time retain, hold, and acquire, for the like period, a similar right of way on half a dozen other routes over which its engineers, at some time or other, may have run a survey, in respect of the same line of road? It certainly was not the intention of Congress that the rights of all the world should thus be left subject to the caprice and whim of the beneficiaries under the general right of way act of of March 3, 1875. This approved map remained on file until after the defendant entered upon the possession of the premises in controversy. (13th finding of fact.) The defendant claims no title and has no title to the premises in controversy except that claimed under the general right of way act of 1875. As this title has no existence in fact, then the defendant is, as respects all persons, including the plaintiff, a mere trespasser upon the premises.

The plaintiff acquired rights in the premises by entering upon the premises and taking possession thereof and by adopting as and for the location of its railroad a survey made over the premises, for and on its behalf, prior to any action taken by the defendant. The court finds in the fourth finding that one W. H. Burrage, acting for the plaintiff, surveyed a line of railroad across the premises in controversy prior to any survey made thereon upon the same premises by the defendant. The court, however, did not recognize the rights of the plaintiff as prior to those of the defendant, for the reason that, as stated in the ninth and tenth findings, the defendant had not, at the time of such survey, filed any articles of incorporation covering its railroad across the premises in controversy. It does appear, however, that the plaintiff, on the 28th of October, 1886, actually made a survey. On the 22d of December, 1886, the plaintiff had complied with the provisions of the general right-of-way act by filing its due proofs with the Secretary of the Interior. It is also a fact, which clearly appears from the findings, that the defendant adopted the line surveyed by Burrage as the line of route of its railroad; and it is also a fact, though not appearing in the findings, that the defendant actually filed a map across the premises in controversy, which, on February 11, 1887, received the approval of the Secretary of the Interior.

See the opinion of Judge Berry in the equity suit, 21 Pac. Rep., 562.

The findings of the court are clear to the effect that on the 22d day of December, 1886, the defendant had perfected its right to acquire a right of way under the general right of way act of March 31, 1875 (10th finding of fact). The plaintiff had a right to make a survey or

adopt that already made by Burrage, as and for the location of its route under the general right of way act.

Sioux City Land Co. *v.* Griffey, 143 U. S., 32;
Lower *v.* Chicago, etc., Ry. Co., 59 Iowa, 563;
Morris & Essex Ry. Co. *v.* Blair, 9 New Jersey Equity, 645.

In Sioux City Land Co. *v.* Griffey (143 U. S., 32), it will be noted, as stated on page 33, that the company, taking the benefit of the act, made its survey long prior to the time when it was qualified to take the grant, and afterwards adopted the survey so made as its definite line of route, and that thereby the line became definitely fixed, and the grant took effect. At the time the plaintiff adopted as the location of its railroad the line surveyed by Burrage across the premises in question, such premises were entirely free from any claim or demand of any kind whatsoever on the part of the defendant. The defendant at that time, according to the thirteenth finding, had filed its map upon line "B," and such map was approved, and the defendant's rights became fixed and vested, and could not afterwards be changed to the detriment of any third person.

McKeoin *v.* Northern Pac. R. R. Co., 45 Fed. Rep., 466;
Pacific Railroad Company *v.* Dunmeyer, 113 U., S., 634;
Missouri, Kansas, and Texas Ry. Co., *v.* Cook, 27 Pac. Rep., 846;
Sioux City, etc., Land Co. *v.* Griffey, 143 U. S., 39.

The defendant at this time had no railroad constructed across the premises in controversy, and was not in the possession of the same.

There is no provision in the act of Congress which gives priority of right by virtue of priority of survey.

Such priority of right by virtue of priority of survey arises under the general principles of the common law.

Sioux City, etc., Ry. Co. *v.* Chicago, etc., Ry. Co. 27 Fed. Rep., 570;

Davis *v.* Titusville & Oil City R. R. Co., 30 Am. & Eng. R. R. Cases, 341;

See, also, in connection with the same subject:

Rochester, etc., Ry. Co. *v.* New York, etc., Ry. Co., 110 N. Y., 120; s. c., 35 American and Eng. Cases, 297;

Barre R. R. Co. *v.* Montpelier, etc., Ry. Co., 39 Am. and Eng. R. R. Cases, 17.

The plaintiff, as a railroad corporation, irrespective of the act of March 3, 1875, had a right to authorize Burrage to make a survey in its behalf and take possession of the premises; and such survey, if prior to that of the defendant, gives priority of right, irrespective of any question under the general right of way act of 1875. When the plaintiff perfected its right to take lands under the general right of way act, it adopted this survey as the location of its road under that act, and its rights under the act then became fixed and vested in the premises in controversy, inasmuch as such premises were then unsurveyed public lands of the United States, and were not subject to any claims of any kind whatsoever on the part of the defendant, that company having exhausted its right under the general right of way act by selecting line "B," indicated upon the map filed with the land officers and approved by the Secretary of the Interior.

The fundamental error committed by the court below was that the court allowed the defendant to shift the location of its road while its maps still remained upon record, and have the shifting take effect as of the date when the defendant first made its preliminary survey across the premises in controversy. Such mere preliminary surveys are not sufficient to prevent rights attach-

ing in the public lands of the United States, otherwise a railroad company would have a right to hold one or more rights of way two hundred feet in width for one and the same railroad. The plaintiff, according to the findings of the court, first took the necessary steps to adopt, as the line of its railroad, the first survey across the premises in controversy. The plaintiff's rights are, therefore, prior, whether the matter is viewed as a matter of priority of survey or as a matter of priority in the adoption of the location. In addition to this, the plaintiff has a right to the premises as its right of way under the general right of way act, and the defendant has absolutely none, for the reason that the defendant's map, filed with the land officers and approved by the Secretary, vested certain rights in the defendant and exhausted the defendant's power to take under the general right of way act. In an action of this character, the effect of the filing and approval of this map can not be set aside and the defendant given equitable relief. No such relief was prayed or sought by the pleadings, and no such relief could have been given in this action by the court below.

The defendant, being a mere trespasser upon the premises in controversy, the plaintiff had a right to commence ejectment, no matter what its legal title was in the premises, but simply by virtue of its prior possession thereof.

Christie *v.* Scott, 14 Howard, 282;
Woods *v.* Bank, 14 New Hampshire, 101;
Wilson *v.* Fine, 38 Fed. Rep., 789.

We beg the court to regard all parts of the oral and printed argument submitted in case No. 4 as submitted also in the present case, No. 585, in so far as the same is pertinent thereto.

W. W. Cotton,
Samuel Shellabarger,
Jeremiah M. Wilson, and
A. A. Hoehling,
For Plaintiff in Error.

FILED.
NOV 4 1895
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE WASHINGTON & IDAHO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY AND THE NORTHERN PACIFIC RAILROAD COMPANY.

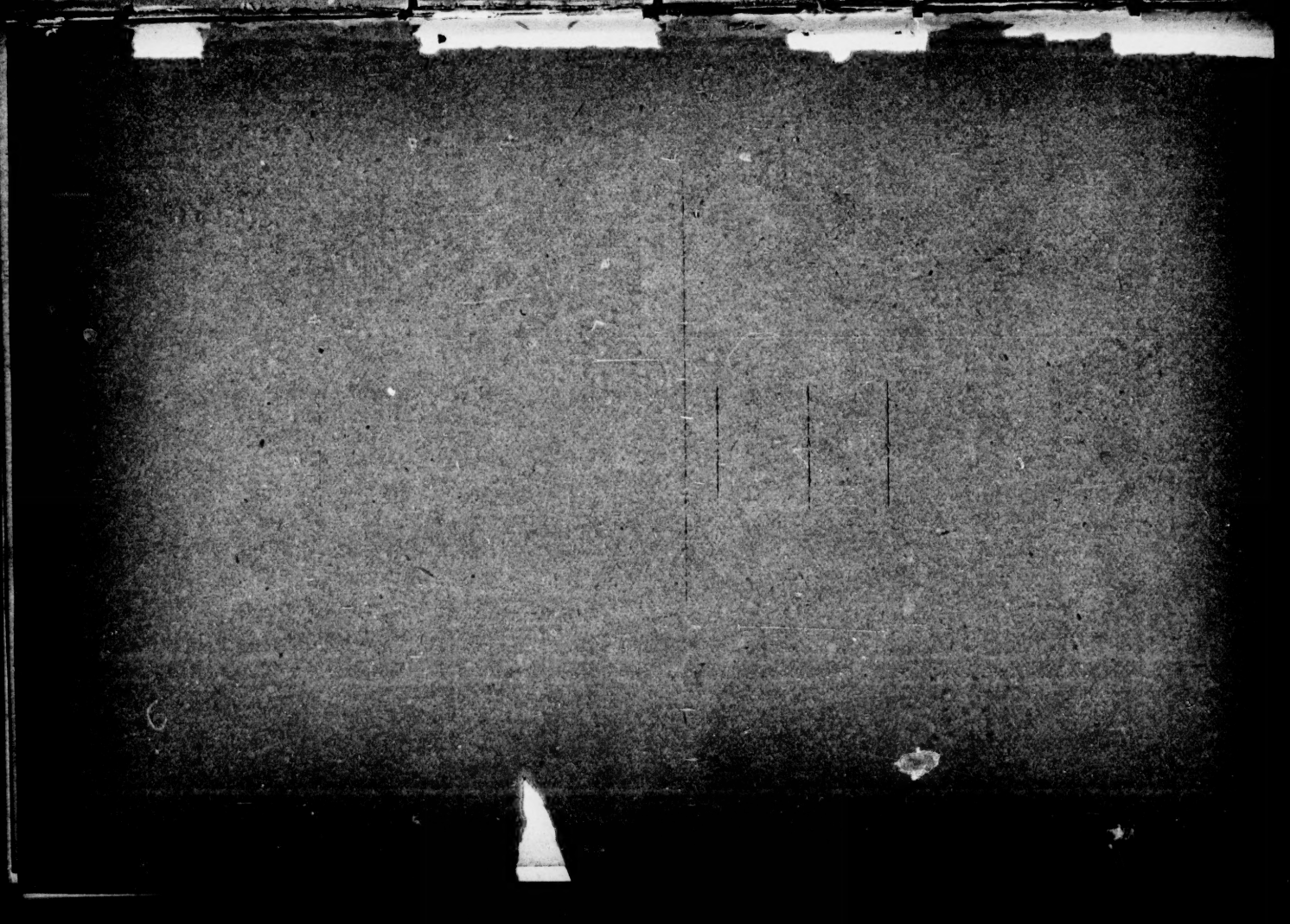
No. 585

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR DEFENDANTS IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Defendants in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.



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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This is a controversy arising under the Act of Congress approved March 3, 1875 (18 Stats. 482), entitled "An Act "granting to railroads the right of way through the public "lands of the United States."

The plaintiff in error originally filed its bill in the First District Court of Idaho Territory against the Cœur d'Alene Company, praying decree perpetually enjoining defendant from using the right of way in controversy, and

establishing the paramount right of plaintiff to the ownership and use thereof. The trial court rendered findings of fact and conclusions of law in favor of the defendant, and on appeal to the Supreme Court of the Territory its judgment was modified upon the sole ground that, as the plaintiff had full and adequate remedy at law, the bill for such perpetual injunction was not appropriate. From that decree appeal has been taken, and the case is now pending here as No. 4 of the present term. Following the decision of the Supreme Court of Idaho (and doubtless suggested thereby) the plaintiff in error, on May 15, 1889, brought ejectment against both the Cœur d'Alene and Northern Pacific Companies in the First District Court of Idaho Territory, claiming as owners in fee simple (R. 2–3). Service was returned, as made on both defendants, May 23, 1889 (R. 5), and thereafter separate answer of the Cœur d'Alene Company was filed (R. 5–7). The case and record thus stood when, on July 3, 1890, Congress admitted Idaho into the Union (26 Stats. 215). Pursuant to section 18 of the Admission Act, and on April 7, 1891, both defendants filed proper petition praying removal of the cause into the Circuit Court of the United States in Idaho. Upon such removal the case was there tried without a jury, resulting in findings of fact (R. 15–20) and conclusions of law (R. 21–22) adverse to plaintiff. The judgment there entered has since been affirmed by the Circuit Court of Appeals for the Ninth Circuit. From that judgment the pending writ of error is taken.

ARGUMENT.

I.

JURISDICTION.

The case was removed into the Federal Court on prior notice to plaintiff, and the record fails to disclose any objection *then* made thereto. In the Circuit Court of Appeals the jurisdiction of the Circuit Court was assailed upon the ground that the record did not disclose, either by way of parties or subject-matter, sufficient ground on which to confer jurisdiction on the Circuit Court.

Section 18 of the Idaho Admission Act authorized such removal of all pending causes on the admission of the State "*whereof the Circuit or District Courts by this Act* "*established might have had jurisdiction under the laws* "*of the United States had such Courts existed at the time* "*of the commencement of such cases, the said Circuit* "*and District Courts of the United States shall be the* "*successors of said Supreme and District Courts of said* "*Territory*" and the Section concludes with the proviso:

"That in all civil actions, causes, and proceedings in "which the United States is not a party, reference shall "not be made to the Circuit and District Courts of the "United States, except upon written request of one of "the parties to such action or proceeding, filed in the "proper Court; and in the absence of such request such "case shall be proceeded with in the proper State Courts."

The facts are:

The Washington and Idaho Company, plaintiff, and the Cœur d'Alene Company, defendant, were respectively organized under the laws of Washington and Montana

Territories. Those Territories were not admitted until the fall of 1889, and hence at the date of the commencement of this action (May 15, 1889) neither corporation was a citizen of a State. But the complaint herein (R. 2) avers that "The Northern Pacific Railroad Company, "defendant, was a corporation duly organized under the "laws of the United States of America," and further (R. 3), "That the defendant, the Northern Pacific Railroad "Company, claims to be in possession of said premises "as a tenant of the Cœur d'Alene Railway and Naviga-"tion Company, and is actually in the possession of said "premises at the present time."

Having joined the Northern Pacific Company as defendant and averred its possession of the premises whereof recovery was sought as a tenant of the Cœur d'Alene Company, it is manifest that the Northern Pacific Company was at the commencement of this action both a necessary and actual party defendant. Hence, under the clear terms of Section 18 of the Idaho Admission Act, that Company had then the right of removal to the Federal Court in Idaho "had such Court existed at the time of the commence-"ment of such case." This conclusion is certain under the doctrine announced in the *Pacific Removal Cases* (115 U. S. 1).

Furthermore, the controversy involved a civil suit arising under the laws of the United States, to wit, conflicting claims under the right-of-way act of Congress of March 3, 1875, and independent of all question of citizenship, a United States Circuit Court then existing would, on that ground, have had jurisdiction thereover. (*Doolan* v. *Carr*, 125 U. S. 620.)

At the time the petition for removal was filed the record showed service upon the Northern Pacific Company (R. 5). The record further recites (p. 14) that at

the trial the Cœur d'Alene Company only appeared, "the "Northern Pacific Railroad Company not having been "served," and the judgment entered thereon ran in favor of the Cœur d'Alene Company (R. 22).

On this it is contended by plaintiff in error that the citizenship of the Northern Pacific Company did not *per se* invest the Circuit Court with jurisdiction, and upon the erroneous assumption that this was and is the sole ground on which the Circuit Court could assume jurisdiction it is contended that its judgment was void.

The petition for removal, wherein the Northern Pacific Co. joined, contains no special appearance by that Company for that purpose. The general declaration is made that it is a defendant in the action, and it then proceeds to allege the facts on which the petition for removal is based. In our view this was *then* a general appearance by that Company in the action, amply sufficient to invest the Court with jurisdiction over the corporation, and no service of process was necessary. Many cases are cited in the opposing brief to the point that the joinder by the Northern Pacific Company in the petition for removal did not make the Company a party to the case. This may safely be conceded on the authorities cited by counsel without reaching the result contended for. All of the cases thus cited on that head are found upon examination to be reduced to two classes:

1st. Where the party seeking removal was objecting to the jurisdiction of the State Court over his or its person. In such cases the Federal Courts have held that the petition for removal did not waive the objection, but simply brought the case into the Federal Court in precisely the condition it then stood in the State Court; or,—

2d. Where, without any question as to the jurisdiction appearing of record, the party seeking removal entered

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2d. Where, without any question as to the jurisdiction appearing of record, the party seeking removal entered

special appearance for that purpose only. Under such conditions the Federal Courts have held that all objections to the jurisdiction of either Court were saved by such special form of appearance.

But the Northern Pacific Company appeared in this case without suggesting any objection to the jurisdiction of the State Court over it, or making any special appearance in connection with the petition for removal. It in effect conceded that it was rightfully in court, and, whether it had been served with the proper process or not prior thereto, its voluntary appearance in the action and petition for removal thereof made it a party thereto in every sense. Whatever conflict may exist in the decisions of the Federal Courts upon this question, we submit the decision of the Circuit Court of Appeals, 6th circuit, rendered February 5, 1895, in *Wabash Western Railroad Company* v. *Brow* (65 Fed. Rep. 941), reaches, both upon principle and authority, the true and appropriate rule. After full discussion of the statute and the decided cases, that Court held (p. 951) that—

"The result of what has been said is that in the case
" before us the appearance of the defendant Company to
" file its petition for removal effected a general appear-
" ance, and it was too late, after such removal had been
" perfected for it in the Circuit Court below, to attempt
" to plead that that Court had not personal jurisdiction
" over the Company by virtue of the process issued."

In marshaling the authorities which uphold that conclusion, the Court further said (p. 951):

"In the following cases it has been held that a petition
" for removal in the absence of a special appearance
" to plead to the jurisdiction in the State Court was a gen-
" eral appearance, which waived all subsequent objection

" on that account. (*Edwards* v. *Insurance Co.*, 20 Fed. " 452; *Tallman* v. *Railroad Co.*, 45 Fed. 156; *Hinds* v. " *Keith*, 6 C. C. A. 231, 57 Fed. 10,—a decision by the " Circuit Court of Appeals of the fifth circuit; *Construc-* " *tion Co.* v. *Simon*, 53 Fed. 6; *Caskey* v. *Chenoweth*, 10 " C. C. A. 605, 62 Fed. 712.)

" *Construction Co.* v. *Simon* is a vigorous decision by " Mr. Justice Jackson, taking the same view of the Act " of 1875 and 1887 which was taken by Mr. Justice Cur- " tis of the Act of 1789."

The subsequent failure of the Northern Pacific Company to appear at the trial of the cause in no way affected the jurisdiction of the Circuit Court. That attached when the removal was effected. *Then* the Northern Pacific Company did appear, and the cause was *then* rightfully removed. That is the test of the whole matter.

The Circuit Court of Appeals, in answering this jurisdictional objection (R. 45), said:

"It canot be said that the Northern Pacific Company " was not an actual party to the litigation. It was not " only made a party, but it was a proper party. It was " the party in possession of premises sought to be re- " covered by an action of ejectment. Its right of pos- " session was determinable by the judgment to be rendered " in that action. It was no less a party from the fact that " in the action of ejectment by the law of Idaho, as " by the law of many other States, the tenant in pos- " session might, by disclosing his interest as tenant only, " permit his landlord to defend the action. The object " of the action was to obtain the possession of the " premises described in the complaint and to obtain an " adjudication in favor of the plaintiff's claim of title to " the same. These objects could not be secured without " the presence of both the defendants."

And with respect to the jurisdictional facts necessary to confer the federal jurisdiction here the Court's opinion concisely states them thus (R. 46):

"What are the jurisdictional facts that should be "made to appear in this case? It was only necessary "to show that one of the parties to the cause at "the commencement of the action and at the time of "the admission of Idaho was a federal corporation, and "that the amount in controversy exceeded two thousand "dollars. These facts distinctly appear from the record. "The complaint alleges that the Northern Pacific Com- "pany at all the times mentioned in the complaint was a "corporation duly organized under the laws of the "United States. The petition for removal alleges that "that Company is a corporation organized and existing "under and by virtue of an Act of Congress entitled 'An "Act granting the lands," etc., approved July 2, 1864. "It necessarily follows from these averments that the "Northern Pacific Company was a federal corporation "at the commencement of the action, on the date of the "approval of the Act admitting Idaho, and at all times "since. There can be no pretence that that corporation "was a nominal party conclusively joined as a defendant "for the purpose of conferring jurisdiction upon the "Federal Courts, for at the commencement of the action "no such removal was possible."

We add only the further pertinent suggestion, viz: The petition for removal distinctly avers that this is a suit of a civil nature, arising under the laws of the United States, wherein the values in dispute exceeded $2,000. As such, it was removable into the Circuit Court irrespective of the citizenship of the parties, under the doctrine held in *Doolan* v. *Carr* (125 U. S. 620). Beyond all question, the facts as developed by this record demonstrate that this is a civil suit, arising under the Federal right-of-way Act. It is equally beyond question that in such a suit, and upon that ground alone, the Circuit Court of the United States in Idaho would have had jurisdiction thereover at the time the action was commenced had such Court then existed. Hence the facts fully meet both the lan-

guage and intention of Congress as expressed in Section 18 of the Idaho Admission Act.

The Merits.

I.

The Act of March 3, 1875 (18 Stats. 482), Sec. 1 provides "That the right of way through the public lands of the "United States is hereby granted to any railroad com- "pany duly organized under the laws of any State or "Territory, except the District of Columbia, or by the "Congress of the United States, which shall have filed "with the Secretary of the Interior a copy of its articles "of incorporation and due proofs of its organization "under the same, to the extent of one hundred feet on "each side of the central line of said road," together with the right to take material from adjacent public lands necessary for construction, and additional land within prescribed area for station buildings, depots, side-tracks, machine shops, turnouts, and water stations.

By Section 2, companies desiring to use any pass or cañon are required to do so jointly, maintaining at their cost all existing or future necessary public highways through such pass or cañon.

By Section 3, provision is made for condemnation of such right of way through private lands or possessory claims on the public lands.

Sec. 4 provides—

"That any railroad company desiring to secure the "benefits of this Act, shall, within twelve months after "the location of any section of twenty miles of its road, "if the same be upon surveyed lands, and, if upon unsur- "veyed lands, within twelve months after the survey

" thereof by the United States, file with the Register of " the Land Office for the district where such land is located " a profile of its road; and upon approval thereof by the " Secretary of the Interior, the same shall be noted upon " the plats in said office; and thereafter all such lands " over which such right of way shall pass shall be dis- " posed of subject to such right of way: *Provided*, That " if any section of said road shall not be completed within " five years after the location of said section, the rights " herein granted shall be forfeited as to any such uncom- " pleted section of said road.

By Section 5 it is provided that the Act shall not apply to any reserved lands, and by Section 6 the right to alter, amend, or repeal the Act is reserved to Congress.

II.

The findings establish that the Cœur d'Alene Co. was incorporated under the laws of Montana Territory on July 6, 1886 (R. 15–17); that its incorporated route " passes over and includes the ground in controversy in " this action " (R. 17); that on July 20, 1886, the Secretary of the Interior received and accepted certified copy of the Company's articles of incorporation and proofs of its organization (R. 17); that in the summer and fall of 1886 said Company constructed its road over its incorporated route from " Old Mission up the main " Cœur d'Alene river to the town of Kingston, and thence " up the South Fork of the Cœur d'Alene river to the " town of Wardner Junction, a distance of about fourteen " miles " (R. 17–18); that in October, 1886, said Company, " for the purpose of extending its line of railroad," caused a survey to be made of its line of railroad and over the line described in its articles of incorporation through the towns of Wallace and Mullen, and marked

the centerline of said road upon the ground by planting stakes at each station at 100 feet, and at such other points as there were angles in the line, " so that the line of route " of said road could be readily traced upon the ground, " and that the said surveying and marking of said line " was completed on the 31st day of October, 1886 " (R. 18); that in making said survey the engineers of the Company ran three lines through the town of Wallace (the locus of this controversy), lines "A" and " B " being run on the south side of the South Fork of the Cœur d'Alene river, and line " C " on the north side of said river, said line " C " being the line on which the Company's railroad was afterwards constructed, " and upon " the ground now in controversy in this action " (R. 18).

That in the summer and fall of 1887 said Company extended its road from Wardner Junction over its line of survey, a point about one mile east of the town of Wallace, " and over said line 'C,' the ground in controversy " in this action, through the town of Wallace, and at all " times thereafter, up to and at the time of the commence- " ment of this action, occupied and used the same as a " railroad and for railroad purposes; and at the time of " the commencement of this action had its road-bed and " track and side-tracks and depot thereon, and was using " the same exclusively for railroad purposes " (R. 19).

" That at all the times above mentioned the lands in " controversy and all other lands along the line of said " railroad of the defendant The Cœur d'Alene Railway " and Navigation Co., as described in its articles of incor- " poration, were *unsurveyed* public lands of the United " States " (R. 19).

" That on the 9th day of November, 1886, the defendant " The Cœur d'Alene Ry. & Nav. Co. filed in the U. S. " Land Office at Cœur d'Alene, Idaho, a map or profile of

" that portion of its railroad running through the town of " Wallace, which was approved by the Secretary of the " Interior, December 3, 1886, and that upon said map or " profile said line 'B' through said town of Wallace was " platted as the line of route of said road; that line 'C' " was, in fact, and intended to be a definite line of loca- " tion thereof, but that said line 'B' was so platted by a " mistake, and that said mistake was not discovered until " after the completion of said railroad and side-track and " depot upon and over the ground in controversy herein, " and that the filing of said plat, showing said road to run " over said line 'B,' was not done for the purpose of, in " any manner, deceiving the plaintiff or any one else, but " was done by a mistake, as aforesaid; and that the " plaintiff was not, in any manner, misled or prejudiced " by the filing of said plat or by said mistake" (R. 20).

III.

With respect to the Washington and Idaho Co., the plaintiff in error, it is found:

That said Company filed its articles of incorporation with the Secretary of the then Territory of Washington on July 7, 1886, describing in detail therein its route of proposed road (R. 19), but—

" That the said line of railroad, as described in the said " articles of incorporation of the plaintiff, nor any of the " branches thereof, did *not* cover or include the ground in " controversy, or any part thereof, or of the valley of the " South Fork of the Cœur d'Alene river, adjacent thereto; " that the eastern terminus of the said branch of railroad " running in the direction of the town of Wallace, as de- " scribed in said articles, was at the town of Wardner, a " distance of about fifteen miles westerly from the town " of Wallace and from the land in controversy herein" (R. 19).

While the plaintiff was thus without any corporate ex-

istence with respect to the route here in controversy, viz., in October, 1886, one Burrage, an engineer, with a party of assistants, and claiming to be acting for the plaintiff, commenced surveying a line of route for a railroad from the town of Wardner up the South Fork of the Cœur d'Alene river to the town of Mullen, keeping several days and several miles behind the surveying party of the Cœur d'Alene Company; that Burrage ran his line over the ground in controversy on October 28, 1886, while the line of the Cœur d'Alene Company was so run thereover on October 29, 1886, " and that all of the parts of the line of the " Cœur d'Alene Ry. and Nav. Co., except said line 'C,' was " run and marked prior to the line run by the said Bur- " rage, said line 'C' being run by the engineers of the " Cœur d'Alene Ry. and Nav. Co. as an amendment, after " they had completed the survey to the town of Mullen " (R. 19).

" That afterwards, to wit, on the 10th day of November, " 1886, and *after* the completion of said survey by said " Burrage, and the said survey by the engineers of the de- " fendant The Cœur d'Alene Ry. & Nav. Co. over the " premises in controversy herein," the plaintiff filed supplemental articles of incorporation with the Secretary of Washington Territory, which provided for a branch line following the South Fork of the Cœur d'Alene river, " which " *extension* would pass over the premises in controversy " (R. 19–20), and on December 26, 1886, filed with the Secretary of the Interior a copy of its said articles of incorporation with copy of the statute of Washington Territory and proof of its organization (R. 20).

" That from the time of the making of the said survey by " said Burrage over the land in controversy, on the 28th " day of October, 1886, until long after the completion of

"the railroad, side-tracks, and depot of the defendant "The Cœur d'Alene Railway & Navigation Company "upon the ground in controversy, neither the said Bur- "rage nor the plaintiff, nor any person for them, or either "of them, ever made any other survey or did any other "act upon the premises in controversy, or took any pos- "session thereof; and that the first act done by said "Burrage, or the plaintiff, upon said premises thereafter "was the survey made thereon in the year 1888 by the "plaintiff; and that at that time the railroad and the side- "track and depot of the defendant The Cœur d'Alene "Railway & Navigation Company was fully constructed "thereon, and had been so constructed, and thereon, since "the fall of 1887; and the defendant The Cœur d'Alene "Railway & Navigation Company was in full and com- "plete operation and possession thereof, and of the "grounds in controversy herein" (R. 20).

From these findings the Circuit Court announced its conclusions of law (R. 21–22) in substance, viz.:

1*st*. That at the time of making said survey by Burrage over the land in controversy, in October, 1886, the plaintiff was not a corporation organized for, or authorized to, construct a railroad over the ground in controversy, or at any point east of Wardner; was not authorized to take any possession of the premises in controversy or to locate a line of road thereon, and that its survey on the 28th of October, 1886, conferred no right upon the plaintiff as against the defendant the Cœur d'Alene Company.

2*d*. That by due incorporation, filing and acceptance of proof thereof with the Secretary of Interior, and by location, appropriation, and construction of its line of railroad upon the premises in controversy, the Cœur d'Alene Company became, under the Federal right-of-way Act of March 3, 1875, the owner of such right of way and entitled to the possession thereof.

3*d*. That the survey made by plaintiff in 1888 was in-

valid and unauthorized, because of the prior appropriation of the premises by the Cœur d'Alene Company.

IV.

The opinion of the Circuit Court (R. 24–26) fully sustains its conclusions *supra* by clear and concise reasoning. The conclusions and decision of that Court are reviewed and affirmed in the opinion of the Circuit Court of Appeals (R. 44–48).

Against these concurring opinions counsel for plaintiff in error substantially assert—

First. That the filing and approval of route "B" of the Cœur d'Alene Co. by the Secretary of the Interior exhausted that Company's right under the law, and it could not thereafter construct upon any *other* line, and certainly not until it had filed and secured a similar approval of the changed route; and

Second. The plaintiff's supplemental incorporation authorizing construction over the line east of Wardner and subsequent *asserted* (but not proven) ratification of the line of survey made by it in October, 1886, and before its lawful right to survey *any* line had arisen, gave it priority both in time and right over the defendant the Cœur d'Alene Company.

Inviting the Court's perusal of the concurring opinions below adverse to these contentions, we submit—

The lands being unsurveyed, no plat of the defendant Company's line was required to be submitted to the Secretary of the Interior for approval, the statute only authorizing the filing of such plat through surveyed lands or within twelve months after the survey thereof. This is the clear language of Section 4 of the right-of-way Act of March 3, 1875, quoted *supra*. The filing of such maps

of right of way through unsurveyed lands has always been regarded as done merely for information, and *not* as conferring any rights upon, or concluding, the Company in any way. Since 1883 this has been the clear and uniform ruling of successive Secretaries of the Interior. Thus, on February 12, 1883 (1 Land Decisions, 397), Mr. Secretary Teller ruled:

"The Act of March 3, 1875 (18 Stats. 482), provides " specifically for approval of maps upon surveyed lands, " but requires no filing or approval of such maps prior to " survey.

"Any regulation of this Department requiring or pro- " viding for the filing of maps over the unsurveyed lands " must be held to operate for purposes of information " merely, and such filing and approval cannot take the " place of nor supersede the approval required by the ex- " press language of the law."

In considering the form of proposed circular instructions concerning rights of way for railroads under Act of March 3, 1875, and for canals, ditches, and reservoir sites under Act of March 3, 1891 (26 Stats. 1095), Mr. Secretary Noble, on March 21, 1892, ruled as follows (14 Land Decisions, 336).

"Heretofore railroad companies desiring to secure the " right of way over the unsurveyed lands of the United " States have been permitted to file a map of location for " the approval of this Department, without waiting for " survey; but it was required that, immediately upon the " survey of the lands traversed by the road, the Company " must file another map showing the line of route in con- " nection with the public surveys. No rights followed " the approval of the map over unsurveyed lands, the " same being furnished presumably as a matter of infor- " mation.

"The Act of 1875 makes no provision for the filing and

" approval of maps of location over unsurveyed lands, its
" provision being ' if upon unsurveyed lands within twelve
" ' months after the survey thereof by the United States,
" ' the Company must file with the Register of the Land
" ' Office for the district where such land is located a
" ' profile of its road; and upon the approval thereof by
" ' the Secretary of the Interior the same shall be noted
" ' upon the plats in said office.'

"No note was to be made upon the local office records
" to guide in the disposition of the public lands, until the
" approval of the map of location, which was to be filed
" *after survey*, and I am, therefore, of the opinion that
" what has already been said relative to the location of
" canals, ditches, and reservoirs over unsurveyed lands
" applies with equal force to railroads claiming the right
" of way under the Act of 1875.

"I have, therefore, omitted from the circular that por-
" tion referring to the filing and approval of railroad
" maps of location over unsurveyed lands, and in future
" you will not transmit such maps to this Department.

"In this connection, I have considered your communi-
" cation of February 9, 1892, relative to the application
" by the Cœur d'Alene Railway and Navigation Com-
" pany, to amend the form of affidavit and certificate re-
" quired by the regulations of this Department to be
" attached to the maps of definite location, presented for
" approval under the Act of March 3, 1875. The basis
" for this application is the fact that maps of location
" have been filed by said Company over unsurveyed lands,
" which maps have been approved by this Department;
" that the surveys were made by different parties, some of
" whom are not now in the Company's employ, and it is
" extremely difficult to make the certificate correspond
" with the circular form; further, there is nothing in the
" form prescribed to be attached to the map of location
" filed after survey to show the approval by the Depart-
" ment of the location made prior to survey. Amended
" forms are presented by the Company for approval, and
" your letter states that ' the principal advantage of the
" ' form is that, where the road shall have been con-

" ' structed, when the Government surveys are made, it
" ' allows of one map being filed covering both location
" ' and construction.'

" *As heretofore shown, no rights accrued from the filing*
" *and approval of the location prior to survey, and I can*
" *see no necessity for such fact appearing in the certificate*
" *attached to the map filed after survey.*

"If the party who made the survey is no longer in the
" Company's employ, I can see no objection to so word-
" ing the affidavit and certificate as to contain the actual
" facts, conforming as far as possible to the prescribed
" form, nor can there be any objection to the consolida-
" tion of the maps of location and construction, where
" construction preceded the survey."

August 17, 1892, Acting Secretary Chandler, after quoting the decision of Mr. Secretary Teller of February 12, 1883, *supra*, held (15 Land Decisions, 192):

"This ruling under the right-of-way Act of March 3,
" 1875, *has always been maintained, and because the ap-*
" *proval of such maps secured no rights to the companies*
" *filing them, nor served any useful purpose in the admin-*
" *istration of the Act*, the practice was discontinued by
" direction in the letter referred to"—*i. e.*, the letter of Secretary Noble *supra*.

This uniform Departmental practice not only clearly conforms to the law, and was in effect long before the filing of the defendant's map of located route through unsurveyed land presented in 1886, but the Court will observe that Mr. Secretary Noble so expressly ruled with respect to this defendant Company in his decision *supra*. Hence it follows that as the defendant Company took no *rights* by such filing, it certainly was not concluded thereby from adopting in actual construction another and different line. It actually *built* its road upon such different line, and was operating same long before the plaintiff

in error sought, in 1888, to make the first legal survey it could have made over the ground in controversy, because, as expressly found by the trial Court, its attempted survey in October, 1886, was a nullity, having been made *before* its incorporation for the purpose of building *any* railroad in the vicinity of the land in controversy. The trial Court and the Circuit Court of Appeals hence concur in ruling that the plaintiff in error was not and could not have been injured, because without right in the premises prior to the defendant's actual construction.

The cases cited in the brief for plaintiff in error in support of the contention that the adoption of line "B" concluded the defendant Company from thereafter constructing upon any *other* line have no application here. They are cases of land-grant railroads whose act of definite location *fixed* the grant made by Congress to aid construction, and when approved by the Secretary of the Interior the *grant* of lands became vested thereunder and hence incapable of change. That principle has no application here. The defendant Company, by filing its map of located line through unsurveyed lands, performed an act not authorized or required by the right-of-way statute. As shown *supra*, it took *no* rights thereby, and hence could not be concluded; whereas, in cases of land-grant railroads, their act of definite location was expressly authorized, and filing of map thereof vested title to many thousands and even millions of acres of the public lands. It was *their* identification of the previously floating grant; and as their right and title *then* vested and by such act of definite location, they were necessarily bound thereby.

In present case the defendant Company ran three differing lines through the unsurveyed public lands, but as expressly found upon the route covered by its incorporation. Prior to survey of the public lands through which

these lines were extended (which occurred in 1891, Finding 12, R. 20), to wit, in 1887, it actually built and has since continuously operated its railroad on one of such lines, to wit, line "C." Manifestly, such appropriation by construction on *one* line concluded it from asserting any claim upon lines "A" and "B," and upon the extension of the public surveys in that region it had no right, and asserted no right, to such lines "A" and "B" by filing of any maps therefor, or otherwise. Hence the contention of counsel that by running several lines through unsurveyed lands the defendant Company unlawfully sought to obtain more than the statute gave, to wit, the grant of right of way for a single line, is answered by the *fact* that it claimed and constructed but one line. It may be added with all propriety—

1st. That the mistake in platting line "B" was without injury to the plaintiff in error, as is expressly found, and hence without right on the part of the plaintiff in error to complain; and,

2d. That mistake occurring with respect to a map not authorized by law to be filed, and conferring no rights when filed, cannot be here urged against the defendant Company as concluding it in any manner.

Prior to the survey of the public lands, the right of a Railroad Company is determined by its lawful appropriation, occupation, and construction. In present case it is found as a fact that in all these respects the defendant Company has priority in time and consequent priority in right. Its road has been actually constructed and in continuous operation since 1887—a period of eight years. The plaintiff in error, so far as disclosed by this record, has no road constructed anywhere in this region. It is simply asserting a paper right against the defendant Company, whose road is in actual operation. In the equity

case (No. 4) it is expressly found that there is abundant room for the construction of several roads at Wallace. Why should it dispossess the defendants, compel removal of this constructed road, station buildings, side-tracks, &c., solely because it ran an unauthorized line, and now seeks by mere legal quibbles to make it appear that a diligent defendant should be unnecessarily displaced to make room for a subsequent and most dilatory plaintiff?

We submit the judgment should be affirmed.

Respectfully submitted.

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